Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

Ron Childress,
Petitioner,

v.

The United States of America,
Respondent.

On Petition for Writ Of Certiorari
To The United States Court of Appeals for
The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition seeks review on certiorari of procedures judicially adopted pursuant to the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), Pub. L. 100-694, (hereafter, the "Westfall Act"), governing the Attorney General's scope-of-employment certification (hereafter, the "Westfall certification") pursuant to 28 U.S.C. § 2679(d) as amended by the Westfall Act.

This petition presents a single question:

> What is the standard of judicial review when the validity of a Westfall certification overlaps with the merits of a plaintiff's claims?

PARTIES TO THE PROCEEDINGS

Petitioner,

Ron Childress is an attorney and member of the South Carolina Bar as well as the bars of the United States District Court for South Carolina and the Court of Appeals for the Fourth Circuit Court of Appeals. He is a resident of South Carolina

Respondent

The United States of America is the respondent, substituted as defendant in the place of an individual employee of the federal government whom the petitioner had sued as an individual party defendant in a South Carolina state court action for the intentional torts of defamation and tortious interference with contractual rights.

Other Parties

Stella Donelan was, at all times relevant, Chief Deputy for Operations at the United States District Court for South Carolina. Stella Donelan is not a licensed attorney nor has she at any time attained a J.D. or L.L.B. degree. Her undergraduate education, if any, is unknown. She is a resident of South Carolina and has been represented by the U.S. Attorney since this action was removed to federal court in October 2007.

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application of Westfall Act provision providing federal employee immunity from ordinary tort suits if attorney general certifies that employee was acting within scope of office or employment at time of incident out of which claim arose (28 U.S.C.A. § 2679(d)), 120 ALR Fed 95 (1994). 11-12

OPINIONS BELOW

The Order of the Court of Appeals for the Fourth Circuit denying rehearing, No. 08-1543, was issued on February 18, 2009, and is unreported. [Fourth Circuit Order, Appendix A-1]

Earlier, on December 22, 2008, the Court of Appeals for the Fourth Circuit issued its unpublished opinion affirming the judgment of the United States District Court for the District of South Carolina. [Fourth Circuit Unpublished Opinion, Appendix A-2 through A-4]

On March 14, 2008, the District Court filed its opinion and order granting substitution of the United States as sole defendant and dismissing this action. [District Court Opinion and Order, Appendix A-5 through A-15]

BASIS FOR JURISDICTION

This Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

(Full Texts Set Out in Appendix)

Constitutional Provisions

U.S. CONST. amend. VII.

Statutes

28 U.S.C. § 1346(b)(1).

28 U.S.C. § 2679(d)(2).

28 U.S.C. § 2680(h).

Court Rules

Rule 10(a) and (c) Supreme Court Rules (SUP. Ct. R.) ("Considerations Governing Review on Certiorari")

Rule 12(b) Federal Rules of Civil Procedure (Fed. R. Civ. P.) ("Defenses and Objections – When and How Presented – By Pleading Or Motion – Motion for Judgment on Pleadings")

Rule 56(c) Federal Rules of Civil Procedure (Fed. R. Civ. P.)("Summary Judgment")

South Carolina Appellate Court Rules (SCACR) Rule 407 ("Rules of Professional Conduct")

Regulations

District Court Clerks Manual, Chapter Five, § 5.07(c), published by the Administrative Office (AO) of the United States Judicial Conference.

STATEMENT OF THE CASE

This is an action under South Carolina common law to recover damages for defamation and tortious interference with contractual rights occurring in the workplace. Both the plaintiff and the individual defendant were co-workers in Clerk of Court Office at the United States District Court for the District of South Carolina.

Unfortunately, claims of workplace defamation and tortious interference seem to enjoy the same reputation as the proverbial "slip and fall" case in the public mind and even among legal professionals. Yet, once in a while, a claim worthy of adjudication does arise.

This petition for review on certiorari does not rest, however, upon the merits of the claims. Instead, this Court's review is sought because the merits of this action overlap with the Westfall scope-of-employment certification that removed the case from the Court of Common Pleas for Richland County, South Carolina, to the United States District Court for South Carolina. In *Osborn v. Haley*, 549 U.S. 225 (2007), this Court discussed this "uncommon" overlap. Its full implications are argued in this petition.

The facts are summarized below. As it happens, no evidence was placed before the trial court other than the Petitioner's Affidavit, with its twenty-six exhibits, together with three other documents supporting his two-memoranda. The Government literally filed no evidence of its own and,

more importantly, did not dispute the contents of the Affidavit. Instead, the Government merely extrapolated its theory of "authorization" from the Petitioner's own evidence. In response, the Petitioner refuted the Government's extrapolations with particularity and sought limited discovery to buttress his refutations and to reveal more fully the inappropriate nature of the Westfall certification.

Portions of the Petitioner's undisputed affidavit are reproduced in the Appendix, along with two other trial court filings: (1) Ethics Advisory 06-12 issued by the South Carolina Bar in November 2006; and (2) a relevant excerpt from the District Court Clerk's Manual, published by the Administrative Office (AO) of the United States Judicial Conference. [Appendix A-21 through A-54, A-55 through A-59 and A-20]. The facts of this case are bizarre and even humorous, to some extent. They appear to be unique in Westfall Act jurisprudence, judging by reported decisions in the federal circuit courts of appeal. While the culminating Westfall "incident" occurred on March 29, 2006, the full history of this action spans the Petitioner's four years of service as a *pro se* law clerk (now termed, "staff attorney") at the United States District Court. As an attorney, with over two decades of broad professional experience, the Petitioner considered his work for members of the Court (as "clients" so to speak) to be a special fiduciary relationship imposing higher ethical duties than the typical attorney-client setting.

In June 2002, the Petitioner was hired by the

Clerk of Court, himself an attorney licensed in South Carolina. Because his substantive legal work was performed for the Magistrate and District Judges, Petitioner assumed that his performance would be evaluated by a judicial officer. In fact, such is the directive of the AO District Court Clerks Manual. [Appendix. A-20]

One year into his employment, however, the Petitioner learned that the chief docketing clerk – Ms. Stella Donelan – claimed to be his supervisor, including "evaluation" of his substantive legal work for the Court. These "evaluation" reports would govern salary increases. Ms Donelan was not a licensed attorney and had no legal education whatsoever.

On learning of this arrangement, the Petitioner attempted to discuss with the Clerk of Court its ethical implications under Rule 5.4(c) of the South Carolina Rules of Conduct for Attorneys. [Appendix. A-19-20.] The Clerk of Court refused to discuss the matter. Ethical Advisory 06-12 subsequently issued by the South Carolina Bar vindicated the Petitioner's ethical analysis (post termination). The opinion directed staff attorneys in his position to establish clearly the identity of the "client" being served, especially in government employment. [Appendix A-55 through A-59]

Throughout his tenure as staff attorney, the Petitioner sought to clarify the identity of his true "client" – who in no case could have been Stella Donelan. Petitioner continued to perform his duties

as a staff attorney serving members of the Court and also to comply with all standards applicable to District employees. The Petitioner did not confront Stella Donelan but instead assiduously avoided conflicts with her. The trial court record reveals no episodes of discord, except for a single occasion in April 2004 when Donelan demanded that the Petitioner revise an order already signed and filed by a District Judge – without consulting judicial chambers. The Petitioner declined to violate his confidential relationship with the Court and subsequently declined a salary increase recommended by Donelan in her "evaluation" report.

For her part, Donelan interpreted all the Petitioner's ethical scruples – to include, declining a pay raise – as mere "displeasure" and insubordination. Curiously, the Petitioner was never disciplined nor threatened with termination as a result. In light of the District Court's personnel manual and its provisions for progressive disciplinary actions, the candid observer is compelled to wonder whether Stella Donelan was actually authorized to "supervise" staff attorneys or, to the contrary, was simply being indulged by the Clerk of Court. The record suggests that she was at all times merely a co-worker of the Petitioner, being neither competent nor authorized to "supervise" or "evaluate" his substantive legal work.

Over time, ironically, Stella Donelan's "supervisory authority" was progressively curtailed, for reasons never disclosed to the Petitioner. In May

2003, she claimed a global authority to collect and synthesize oral input from telephone interviews with the Magistrate Judges. By May 2004, she was collecting and synthesizing written input from the Magistrate Judges (withholding the actual documents from the staff attorneys). Finally, in September 2005 the written inputs of the Magistrate Judges were delivered directly to the staff attorneys. In September 2005, the Petitioner considered that his ethical problem under Rule 5.4(c) had been successfully resolved. He so informed the Clerk of Court.

Apparently, Stella Donelan was incensed by the change. In September 2005, she wrote comments in her interim review projecting adolescent thoughts and feelings upon the plaintiff and complaining that he was undermining her "supervision." On March 29, 2006, Stella Donelan struck the final blow, writing in her "evaluation" report:

> I now want to elaborate on his disrespect for me in my role as his supervisor. He does not use nasty words when he verbally assaults my position as a matter of fact, he phrases it so cunningly that I sometimes find that I ask myself, 'Did I hear him correctly?' All members of the Staff team have noticed his subordination [sic] to me and have commented about it. When Ron is subordinate [sic] to me, it creates stress and dissidence for the

whole Staffer team.

Primitive, incorrect word choices and poor punctuation aside, the most startling aspect of this document is the complete absence of factual content. Despite the absence of factual support or any prior history, Donelan demanded Petitioner's termination. In response, the Petitioner requested that the Clerk of Court require Donelan to produce evidence. Instead, the Clerk declared that Petitioner could resign or be fired immediately. The Petitioner's subsequent Employee Dispute Resolution (EDR) was terminated by administrative fiat ten days after it was filed.

This action was commenced in the Court of Common Pleas for Richland County, South Carolina. It was removed to federal court in October 2007 and dismissed in March 2008. Timely appeal was filed in the Court of Appeals for the Fourth Circuit, where the district court judgment was affirmed in a *per curiam* unpublished opinion in December 2008 and rehearing denied on February 18, 2009.

As described below, Petitioner's appeal to the Fourth Circuit relied upon the panel decisions in *Gutierrez v. Drug Enforcement Administration*, 111 F. 3d 1148 (4th Cir. 1997) and *Maron v. United States*, 126 F. 3d 317 (4th Cir. 1997), decided within six months of one another. Read together, these decisions provide a "template" for judicial review of Westfall certifications that has not been devised by any other circuit court of appeals. Petitioner urges that this "template" be considered and adopted by

this Court.

Unfortunately, the unpublished opinion of the Fourth Circuit offered no comments upon the *Gutierrez-Maron* template nor the failure of the trial court to follow it. Seeking a rehearing or *en banc* rehearing, Petitioner requested a reconciliation of *Gutierrez* and *Maron* in view of actual differences between the panel opinions that could lead district courts to inconsistent results in Westfall certification cases. Rehearing was denied without an opinion.

ARGUMENT

Introduction

Review of the present case by this Court on a writ of certiorari is appropriate under SUP. CT. R. 10(a) and (c) because: the Fourth Circuit Court of Appeals has sanctioned a departure from the appropriate and usual course of Westfall certifications that calls for exercise of this Court's supervisory power; and the appropriate procedure for Westfall certifications in the presence of an "Osborn overlap" is an important question that has not been, but should be, settled by this court.

A Model for Judicial Review of Westfall Certifications

Two panel decisions in the Fourth Circuit Court of Appeals – *Gutierrez v. Drug Enforcement Administration*, 111 F. 3d 1148 (4th Cir. 1997) and *Maron v. United States*, 126 F. 3d 317 (4th Cir. 1997) – provide a five-step procedure for judicial review of Westfall certifications. In the setting of the "uncommon overlap" described in *Osborn v. Haley*, 549 U.S. 225 (1007), this procedure or "template" has no rival in any other federal circuit. Unfortunately, in the present case, the trial court ignored these Fourth Circuit precedents. On appellate review, the Court of Appeals for the Fourth Circuit declined to provide any comment beyond a *per curiam* affirmance.

Review on certiorari is sought so that this Court may consider again the *Osborn* "uncommon overlap" in light of the Seventh Amendment to the

United States Constitution and also the varied and disparate approaches taken in the federal circuits to judicial review of Westfall certifications in this unique setting. As an introduction to the *Gutierrez-Maron* template, the "overlap" itself should be placed in the context of Westfall Act jurisprudence as it has developed over twenty years. More importantly, Petitioner's argument of a connection between the "overlap" and the Seventh Amendment to the U.S. Constitution requires explanation.

***Osborn* and the "Uncommon Overlap"**

The phrase "scope of employment" is used both in the Westfall Act and the Federal Tort Claims Act (FTCA) as a whole. If the phrase "scope of employment" also appears in State *respondeat superior* law (including official immunity statutes or doctrine), then review of Westfall certifications should be relatively simple. In these instances judicial review of Westfall certifications could resemble the proverbial cookie-cutter.

Many reported Westfall certifications do reveal a less than profound inquiry into State *respondeat superior* doctrine. *See* Kurtis A. Kemper, *When Has Federal Employee Acted Within Scope of Employment for Purposes of Westfall Act, 28 U.S.C.A. § 2679, Permitting Substitution of United States as Defendant in Action Asserting Intentional Tort Not Involving Personal Injury or Death*, 14 ALR Fed 2d 251 (2006); Andrew M. Campbell, Annotation, *Construction and application of Westfall Act provision providing federal employee immunity from*

ordinary tort suits if attorney general certifies that employee was acting within scope of office or employment at time of incident out of which claim arose (28 U.S.C.A. § 2679(d)), 120 ALR Fed 95 (1994).

In a footnote, *Osborn* described two situations in which judicial review of Westfall certifications should not require penetrating inquiry into State law:

> The overlap of certification validity and the merits of the plaintiff's claim, evident here, is uncommon. It is unlikely to occur when the plaintiff alleges negligent conduct. The question whether a federal driver was acting within the scope of his employment at the time of an accident, for example, can generally be answered without simultaneously determining whether the federal employee drove negligently or carefully. And even when the plaintiff alleges an intentional tort, it may be possible to resolve the scope-of-employment question without deciding the merits of the claim. If a plaintiff charges a federal employee with sexual assault, for example, upon determining that there was sexual contact, a district court could find that the employee acted outside the scope of his duties, leaving the question whether the contact was consensual for jury resolution.

Osborn, 549 U.S. at 252 n.15. Most Westfall certifications do indeed involve one or the other of these straightforward fact patterns.

Between the two pure forms of Westfall fact patterns, *Osborn* recognized a spectrum of "uncommon overlap" cases in which the defendant's alleged conduct is not obviously within the scope of employment nor is it obviously beyond the bounds of any conceivable job description. The present case is an excellent example of the *Osborn* "overlap." Stella Donelan was not driving a government vehicle or engaged in a routine ministerial function that caused injury by negligence or good faith mistake. On the other hand, Stella Donelan's misconduct did not consist of gross physical misdeeds such as physicians or counselors sexually abusing patients. Her actions were, however, closer to the intentional extreme than to a routine instance of negligence.

Which Law of the State?

Scope-of-employment in a Westfall certification is determined by the law of the State in which the incident occurred. The Petitioner has found only one circuit court decision – *Wilson v. Drake*, 87 F. 3d 1073, 1078 (9th Cir. 1996) – that has included State doctrines of official immunity (California) in its analysis. Nothing in the Westfall Act seems to preclude such inquiry, although it is almost never done. Nor have many decisions inquired deeply into State common law governing intentional torts especially workplace misconduct.

The present case provides a striking

illustration of the *Osborn* "overlap" as it entails multiple questions of South Carolina tort law. Cases of workplace defamation and tortious interference with contractual rights require two findings: (1) the presence or absence of privilege (generally a matter of law); and (2) abuse of the privilege (in South Carolina, a jury question).

In South Carolina, a defamation claim arises when a spoken communication (slander) or a written communication (libel) occurs. While other elements complete the cause of action, South Carolina adjudication of such a claim consists of two distinct questions: (1) whether or not the communication was "privileged" on some ground; and (2) whether or not the privilege was abused. In South Carolina, "communications between officers and employees of a corporation, whether operating in the same office or in different and distinct offices, are qualifiedly privileged if made in good faith and in the usual course of business." *Conwell v. Spur Oil Company of Western South Carolina*, 125 S.E. 2d 270, 275 (S.C. 1961), and cases cited.

Murray v. Holnam, 542 S.E. 2d 743 (S.C. Ct. App. 2001), cited the above principle forty years after the *Conwell* case. *Murray* was a defamation action by a former employee, and on that occasion the South Carolina Court of Appeals discussed the respective duties of judge and jury in the first and second stages of adjudicating a defamation case:

> In general, the question whether an occasion gives rise to a qualified or

> conditional privilege is one of law for the court. 50 Am.Jur.2d Libel and Slander § 276 (1995). However, the question whether the privilege has been abused is one for the jury. Id. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. Id.; see also Restatement (Second) of Torts §§ 599-610. In *Fulton* [v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951)], this Court held that it was a question for the jury to determine if the publication went beyond what the occasion required and was unnecessarily defamatory. [citations omitted].

542 S.E. 2d at 749. The trial court in *Murray* had properly found qualified privilege but erred by failing to recognize abuse of the privilege as a jury question. *Id.*

Given that the Petitioner's Affidavit was not disputed in the trial court, the falsity of Stella Donelan's allegations on March 29, 2006 – evidenced by her retraction of these same allegations during

Petitioner's truncated EDR proceeding – could support a jury finding that the South Carolina qualified privilege for workplace defamation had been abused. A close inquiry by the trial court into these points of South Carolina defamation law would have justified denial of the Westfall certification.

In South Carolina, tortious interference with a contract consists of five elements: (1) existence of a valid contract; (2) the wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) absence of justification; and (5) resulting damages. *Camp v. Springs Mortg. Corp.*, 426 S.E. 304 (S.C. 1993); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 336 S.E. 2d 472 (S.C. 1985); *DeBerry v. McCain*, 274 S.E.2 d 293 (S.C. 1981); *Collins Entertainment Corp v. Coats and Coast Rental Amusement*, 584 S.E. 2d 120 (S.C. Ct. App. 2003), *aff'd* 629 S.E. 635 (S.C. 2006).

Normally, in South Carolina, an officer of a corporation, being a corporate "agent," cannot interfere with contracts of the organization. Thus, tortious interference with employment contracts by co-workers would present a novel and complex question of South Carolina law (as in most jurisdictions). There is no reason to believe it would be rejected as a cause of action. Authority for such an action does exist despite the rarity of its actual occurrence. *See Ramsey v. Greenwald*, 414 N.E. 2d 1266 (Ill. 1980).

In the middle of the *Osborn* "overlap" – where intentional torts merge with scope-of-employment –

judicial review of Westfall certifications should recognize the increasingly apparent variety of fact patterns. In light of the "overlap," Petitioner argues that inquiry into State *respondeat superior* doctrine should include official immunity doctrines as well as principles governing intentional torts.

The Westfall Act After Twenty Years

Westfall Act litigation has been ongoing for over twenty years. It is not surprising that the "overlap" phenomenon has received no serious consideration, given that other significant gaps in the legislation required attention. Since adoption of the Westfall Act, this Court has resolved three crucial issues: (1) Westfall certifications have been held subject to judicial review if challenged by a plaintiff; (2) even after rejecting a Westfall certification, district courts must retain jurisdiction of an action rather than remanding to state court; and (3) the Government may simultaneously advance a Westfall certification while denying the misconduct alleged.

Judicial Review

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), brought before this Court the failure of Congress to determine the conclusive effect (if any) of a Westfall certification. Early on, a number of district court decisions treated the certification as "conclusive" upon all issues, regardless of the plaintiff's claims. With time, circuit courts of appeal began reviewing lower court decisions and a conflict among the circuits arose. *Lamagno* came to this Court from the Fourth Circuit where *Johnson v.*

Carter, 983 F. 2d 1316 (4th Cir. 1993) held that a Westfall certification as conclusive upon the issue of substituting the United States as sole defendant.

Writing for the Court, Justice Ginsburg noted the conflict among the circuits regarding judicial review of Westfall certifications. *Lamagno*, 515 U.S. at 423, n. 3. After a lengthy analysis of the Westfall Act, precedents and even THE FEDERALIST No. 10, the Court concluded that judicial review was not only allowed but required. *Lamagno*, 515 U.S. at 426-434. The dissenters were Justice Souter, joined by Chief Justice Rehnquist with Justices Scalia and Thomas. The majority which supported judicial review (Justices Ginsberg, Stevens, O'Connor, Kennedy and Breyer), dissolved, however, when Part IV of the opinion suggested that a district court should retain jurisdiction over a state common law tort case even after setting aside a Westfall certification. In a separate opinion, Justice O'Connor noted that the *Lamagno* case did not entail removal and that the issue should be reserved for future decision.

Remand and Incident-Denial

In *Osborn v. Haley*, 549 U.S. 225 (2007), the question of remand indeed returned to this Court, accompanied by another question – the effect of incident-denial by the Government. The plaintiff, Osborn, was employed by a contractor for the United States Forest Service. She applied for a position with the Forest Service which was offered to another applicant by defendant Haley. Thereafter she sought a Department of Labor investigation into the hiring

which determined that the proper procedure had been followed. Meanwhile, her employer had admonished her to apologize for insulting Haley. When she refused to do so she was terminated. Osborn then sued Haley (and others) in Kentucky state court for tortious interference with her employment. *Osborn*, 549 U.S. at 232.

The action was removed to the United States District Court for the Western District of Kentucky upon a Westfall certification by the U.S. Attorney. In the ruling appealed to the Sixth Circuit, the district court held that the Government's denial of the alleged conduct rendered the Westfall certification improper and required remand to State court. *Osborn*, 549 U.S. at 235-236.

Reversing the district court, the Court of Appeals for the Sixth Circuit determined that a Westfall certification was not vitiated by an accompanying denial of the alleged conduct. On the question of remand, the Sixth Circuit joined the Third, Fourth and Fifth Circuits in deeming remand improper even after rejecting a Westfall certification. *Osborn*, 549 U.S. at 237.

In *Osborn*, Justice Ginsburg – joined by Chief Justice Roberts with Justices Stevens, Kennedy, Breyer and Alito – upheld the Sixth Circuit, determining that district courts should retain jurisdiction over state claims even after rejecting a Westfall certification and substitution. *Osborn*, 549 U.S. at 245, 256. A different majority (substituting Justice Souter for Justice Breyer) concluded that a

Westfall certification was not undermined by a denial of the alleged conduct. *Osborn*, 549 U.S. 254-255.

The Westfall Act's "Third Rail"

No mention has yet been made of *United States v. Smith*, 499 U.S. 160 (1991) – this Court's first case following adoption of the Westfall Act. *Smith* was an action alleging medical malpractice by a military physician. Unfortunately for the plaintiffs, the malpractice occurred at a United States Army hospital in Vicenza, Italy. *Smith*, 499 U.S. at 162. The FTCA, 28 U.S.C. § 2680(k), expressly excludes "any claim arising in a foreign country."

Smith revealed what might be called the Westfall Act's "third rail" – namely, the fate of plaintiffs whose claims implicate an exclusion under FTCA. In 1987, the *Smith* plaintiffs brought action in the United States District Court for the Central District of California. The United States moved to have itself substituted as defendant under 10 U.S.C. § 1089 (the "Gonzales Act" governing suits against military medical personnel). The government also invoked the FTCA exclusion in seeking dismissal. The trial court granted substitution and dismissal, and the plaintiffs appealed. While the appeal was pending, Congress adopted the Westfall Act.

Before the United States Court of Appeals for the Ninth Circuit, the government primarily relied upon the Westfall Act and the FTCA exclusion as grounds for affirming the dismissal, apparently abandoning the Gonzales Act rationale. The Ninth

Circuit concluded that the FTCA exclusion, 28 U.S.C. § 2680(k), did indeed preclude recovery from the United States on the malpractice claim. Since the FTCA provided no recovery for the plaintiffs, the Court reasoned that the Westfall Act. *Smith*, 499 U.S. at 165.

The Court noted a conflict among the circuit courts on this issue and reversed the Ninth Circuit. *Smith*, 499 U.S. at 165. Justice Marshall observed that, in the Westfall Act, Congress had specifically exempted two sets of claims – constitutional violations by government employees (*Bivens* claims) and violations of statutes authorizing recovery from government employee. *Smith*, 499 U.S. at 167. Justice Marshall concluded: "Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA." *Id.*

By venturing to create a third exception to the Westfall Act, it might be said that the Ninth Circuit had touched the statute's "third rail." Whether writing ironically or not, Justice Marshall observed that Congress never intended to show "solicitude for tort plaintiffs' rights" and that "we are obliged to give [that intent] effect." *Smith*, 499 U.S. at 175.[1] Justice

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[1] – The possibly irony arises from Justice Marshall's criticism of absolute immunity in the original *Westfall* decision: "An injured party with an otherwise meritorious tort claim is denied

Stevens filed a lengthy dissent in which he found that a recurring theme in the legislative history was, in fact, a concern "to preserve the scope of existing remedies...." *Smith*, 499 U.S. at 180-181.

The "Third Rail" Rediscovered

Justice Stevens' dissent in *Smith*, seemed to find an echo in both *Lamagno*, and *Osborn*. In *Lamagno*, the Court twice noted that upholding the Westfall certification and substituting the United States would be lethal to the plaintiffs' case. Early in the opinion, Justice Ginsburg wrote:

> Ordinarily, scope-of-employment certifications occasion no contest. While the certification relieves the employee of responsibility, plaintiffs will confront instead a financially reliable defendant. But in this case, substitution of the United States would cause the demise of the action: Petitioners' claims "ar[ose] in a foreign country," FTCA, 28 U.S.C. § 2680(k), and thus fell within an exception to the FTCA's waiver of the United States' sovereign immunity.

Lamagno, 515 U.S. at 422. In a later passage,

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compensation simply because he had the misfortune to be injured by a federal official." *Westfall*, 484 U.S. at 295. The issue might be framed in terms of equal protection: wRen plaintiffs daily sue fellow citizens in state and federal courts nd recover damages for intentional torts, why should a similarly situated plaintiff be denied the same access to courts because the tortfeasor was a federal bureaucrat?

Justice Ginsburg observed that in most circumstances the Westfall certification actually exposed the government to a recovery, but:

> The situation alters radically, however, in the unusual case – like the one before us – that involves an exception to the FTCA. When the United States retains immunity from suit, certification disarms the plaintiffs. They may not proceed against the United States, nor may they pursue the employee shielded by the certification. *Smith*, 499 U.S., at 166-167, 111 S. Ct. At 1185. In such a case, the certification surely does not qualify as a declaration against the Government's interest: it does not expose the United States to liability, and it shields a federal employee from liability.

Lamagno, 515 U.S. at 427.

Having recognized the *Lamagno* case as "unusual," Justice Ginsburg in *Osborn* noted the "uncommon overlap" between the merits of the plaintiff's claim and the disposition of the Westfall certification. In particular, Justice Ginsburg observed that a decision upholding the certification would determine the plaintiff's case "with no access to a jury of her peers" when the determinative issues might indeed turn upon jurors' assessments of credibility. *Osborn*, 549 U.S. at 251. Quoting *Wood v. United States*, 995 F. 2d 1122, 1136-1137, (1st Cir.

1993), the Court remarked that : "This is not a small objection...." Petitioner proposes that this objection is indeed a serious one but also remediable by means of the Fourth Circuit "template" described herein.

Immunity, Balancing Tests and Access to Courts

Although *Westfall v. Erwin*, 484 U.S. 292 (1988) was the impetus for the Westfall Act, certain aspects of the original decision were not superseded by the legislation. To be sure, the United States Supreme Court has long recognized the importance of protecting federal employees from the chilling effects of nuisance litigation. *See Westfall*, 484 U.S. at 295. *Westfall* itself invoked *Barr v. Mateo*, 360 U.S. 564, 571 (1959), in which the Court articulated the basic rationale for official immunity:

Barr had recognized, however, that immunity must have limits. *Barr*, 360 U.S. at 565, 573. In *Doe v. McMillan*, 412 U.S. 306 (1973) the Court called for "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens...." *Doe*, 412 U.S. at 320.

The process of certification, removal and substitution under the Westfall Act is a context in which legitimate governmental interests must be balanced against due process rights of plaintiffs, including the right to jury trial and recovery of punitive damages for intentional torts. *Osborn* recognized that the decision to uphold a Westfall certification can mean that a plaintiff "will lose on the merits with no access to a jury of her [or his]

peers." *Osborn*, 549 U.S. at 251. It would be difficult to imagine a more compelling context for the "discerning inquiry" urged by *Doe v. McMillan*.

Access to Courts

Access to courts has long been recognized as a fundamental right and bedrock of substantive due process in American jurisprudence. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the United States Supreme Court had occasion to consider access to courts from the plaintiff's side – not an everyday occurrence, as noted by Justice Harlan. At issue were filing fees required to commence divorce actions in Connecticut. Welfare recipients who could not afford these fees claimed that they were therefore denied substantive due process. Justice Harlan saw access to courts as fundamental to due process for plaintiffs no less than for defendants. *Boddie*, 401 U.S. at 377. Resort to the judicial process is "no more voluntary" for one class of litigants than for the other.

Boddie identified two dimensions of this fundamental right: (1) meaningful opportunity to be heard "absent a countervailing state interest of overriding significance" and (2) freedom from denial of this protected right through unconstitutional application of an otherwise valid statute (i.e., "as applied" denial). 401 U.S. at 377-379. Judicial review of a Westfall certification requires a "discerning inquiry" and careful balancing of the federal government's interest in administrative convenience and efficient operations against a plaintiff's fundamental right of access to courts and

meaningful opportunity to be heard. The "overriding significance" and "compelling" nature of these government interests are not intuitively obvious. Ultimately a court may discern the need to resolve this unsettling disbalance which elevates governmental convenience over a fundamental right of citizens.

Jury Trial

The right to jury trial at common law is, of course, preserved in federal courts by Amendment Seven to the United States Constitution. In *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), the Supreme Court highlighted this bedrock principle even as it recognized a narrow exception. Justice Brennan wrote for the Court:

> Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury....Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or

> lies against the Federal Government in its sovereign capacity.

Granfinanceria, 492 U.S. at 51-53. There is no dispute that the FTCA, as a Congressionally enacted waiver of sovereign immunity, establishes a cause of action involving public rights and justiciable claims having no roots in the common law. Not surprisingly, 28 U.S.C. § 2402, bars jury trial of actions against the United States, except to recover amounts improperly collected as taxes or penalties.

At issue in *Granfinanciera* was the statutory scheme for bankruptcy proceedings. The FTCA might actually be considered the true paradigm for *Granfinanciera*. FTCA is indeed a statutory scheme whereby Congress established causes of action involving public rights and justiciable claims having no roots in the common law. Not surprisingly, 28 U.S.C. § 2402, bars jury trial of tort claims against the United States.

It is by no means clear, however, that the Westfall Act – even as part of the FTCA – was intended to supplant common-law causes of action . On first reading, the statutory language might suggest such an intention. Under 28 U.S.C. § 2679(d)(2), upon the Government's certification and removal, a state court action "shall be deemed an action or proceeding brought against the United States under the provisions of this Title...." Such a literal reading, however, would make the Government's certification conclusive upon the issue of substitution, a result which *Lamagno* rejected

seven years after adoption of the Westfall Act.

Perhaps with *Lamagno* in mind, the *Osborn* Court was careful to limit any "supplanting" effect to that specific period of time when the district court is conducting its judicial review of the Westfall certification. The certification indeed "deems" the action to be one under the FTCA, "unless and until the district court determines that the federal officer originally named as defendant was acting outside the scope of his employment." *Osborn*, 549 U.S. at 252. Temporarily, therefore, the plaintiff is proceeding against the United States: "Thus, at the time the district court reviews the Attorney General's certification, the plaintiff has no right to a jury trial." *Id.* The Supreme Court has not, however, recognized the Westfall Act as supplanting state common law actions for intentional torts on the *Granfinanciera* model.

Thus, nothing the statutory language just mentioned – the "deeming" provision in § 2679(d)(1-3) – the Westfall Act nowhere claims to "supplant" state common law causes of action in the sense of *Granfinanciera*. Quite to the contrary, as various courts have noticed, the legislative history is replete with reassuring pledges to protect established rights of recovery in cases of intentional torts. The House of Representatives Report No. 100-700, at 5 (1988), *reprinted in* 1988 United States Code Congressional and Administrative News at 5949, makes the following declaration: "If an employee is accused of egregious misconduct, rather than mere negligence or

poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable."

Circuits Avoid the "Third Rail"

In Westfall certifications where the "overlap" has implicated the substantive due process right of access to the courts and/or the procedural due process right of jury trial, the circuits have avoided contact with the "third rail" by various approaches. The Fourth Circuit model, however, integrates these techniques into a single five-step procedure as described below. (Unfortunately, in the present case, the "template" was ignored by the trial court and also by the court of appeals despite Petitioner's urging and request for *en banc* consideration.)

Petitioner has reviewed at least one hundred fifty (150) reported Westfall decisions rendered in the federal circuit courts of appeal since the enactment of the legislation. From that number approximately thirty "overlap" cases presented claims of workplace defamation and/or tortious interference with contractual rights. Full briefing of these cases is not possible within the confines of a certiorari petition, but a sample of the approaches can be provided.

In *Kelly v. US*, 924 F. 2d 355 (1st Cir 1991), the court of appeals adopted the "familiar contours" of the summary judgment standard for Westfall certification review. *Kelly*, 924 F. 2d at 357. The plaintiff had failed to contradict the certification "in any meaningful way." *Kelly*, 924 F. 2d at 360

In *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993),

the court of appeals considered alternative approaches to reviewing Westfall certifications: as a motion on the pleadings under Fed. R. Civ. P. Rule 12(b)(6) or a summary judgment. The case was remanded to the district court to clarify its approach to the certification. *Aliota*, 984 F. 2d at 1358-1359. A year later, in *Melo v. Hafer*, 13 F.3d 736 (3rd Cir. 1994), the Third Circuit further elaborated its summary judgment model, analyzing four different versions of judicial review in Westfall certification cases and including plaintiff jury trial rights. *Melo*, 13 F. 3d 744-748. The District of Columbia Circuit cited *Melo* in its own initial foray into the summary judgment dimension of "overlap" cases. *Kimbro v. Velten*, 30 F.3d 1501, 1505 and 1509 (D.C. 1994). Most recently, the D.C. Circuit has further pondered the jury trial question in the setting of workplace intentional torts. *Majano v. United States*, 469 F. 3rd 138 (D.C. Cir 2006). In *Anthony v. Runyon*, 76 F.3d 210 (8th Cir. 1996), the court of appeals seemed to envision a step-by-step approach to review of Westfall certifications without setting a specific standard of proof, as discussed below with the Fourth Circuit "template." But for space limitations, other cases deserving review include *Taboas v. Mlynczak*, 149 F.3d 576 (7th Cir. 1998); *Rogers v. Management Technology, Inc.*, 123 F.3d 34 (1st Cir. 1997).

The Fourth Circuit Template for Judicial Review

When *Lamagno* returned to the Fourth Circuit, the case was remanded to the district court for disposition. On subsequent appeal, the court of

appeals announced *Gutierrez v. Drug Enforcement Administration*, 111 F. 3d 1148 (4th Cir. 1997):

> In short, the scope-of-employment certification is prima facie evidence that the defendant federal employee acted within the scope of his employment, thereby placing the burden on the plaintiff to prove otherwise. If the plaintiff does not come forward with any evidence, the certification is conclusive. Moreover, the plaintiff's submission must be specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation. If the plaintiff's evidence is sufficient to carry the burden of proof, the defendant federal employee or the Government may come forward with evidence in support of the certification. At this point, the district court may permit (and limit) any needed discovery. Thereafter, the district court must determine whether there are any genuine issues of fact material to the scope-of-employment decision, and, if so, it may conduct an evidentiary hearing to resolve these factual issues. Once any factual issues are resolved, the district court should weigh the

> evidence on each side to determine whether the certification should stand. During this process, the district court should remain cognizant of the considerations weighing against protected litigation under the Westfall Act.

Gutierrez, 111 F. 3d at 1155.

Five aspects of *Gutierrez* deserve special attention:

> (1) no standards were announced for the actual content of an initial Westfall certification;
> (2) the plaintiff's burden of proof was not explicitly defined – that is, the "sufficiency" of the evidence submitted or forecast to challenge the certification;
> (3) response to the plaintiff's showing was optional (the defendant employee or the Government "may" come forward with evidence to support the certification);
> (4) while the district court was required to ("must") determine if any genuine issues of material fact were presented, it retained discretion to grant discovery before and/or an evidentiary hearing after it had identified the issues;
> (5) no specific evidentiary standard was established for deciding the scope-of-employment issue, although

> the district court was directed to "weigh the evidence on each side."

Within six months following *Gutierrez*, another panel decided *Maron v. United States*, 126 F. 3d 317 (4th Cir. 1997). While *Gutierrez* was not an "overlap" case, *Maron* was. *Maron* seemed to clarify an intriguing allusion in *Gutierrez* to "genuine issues of material fact" which suggested summary judgment standards under Rule 56(c) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.). The basic holding in *Maron* was:

> We specifically hold that the certification satisfies the government's prima facie burden but does not carry any evidentiary weight unless it details and explains the bases for its conclusions. If the plaintiff presents persuasive evidence refuting the certification, the government must provide evidence and analysis to support its conclusion that the torts occurred within the scope of employment.

Maron, 126 F. 3d at 323.

Maron then cited with approval the following trial court language: "[O]nce the certification is filed it constitutes, in effect, a motion for summary judgment and challenges the plaintiff to come forward with an evidentiary showing that, if proven, would be sufficient to take a case out of the scope of employment as shown by the certification." This

language from the trial court order became an explicit holding in *Maron*: "We hold that the procedures employed by the district court are the proper ones for evaluation of a scope of employment certification." *Maron*, 126 F. 3d at 322. The subsequent decisions in *Ross v. Bryan*, 309 F. 3d 830 (4th Cir. 2002) and *Borneman v. United States*, 213 F. 3d 819 (4th Cir. 2000) applied *Maron* without further elaborating its substantive guidance.

Read together, *Gutierrez* and *Maron* seemed to create a "template" for judicial review of Westfall certifications that basically follows the contours of a Rule 56(c) summary judgment proceeding. As the "moving party," the Government must present the district court with grounds for substitution of the United States as defendant. An initial Westfall certification ("Step One") will carry no evidentiary weight "unless it details and explains the bases for its conclusions." *Maron*, 126 F. 3d 323. If the plaintiff (the "nonmoving" party) does not challenge a "shell" certification, however, then the Government's certification concludes the matter.

A plaintiff who does challenge the scope-of-employment certification ("Step Two") may not rely upon speculation or "conclusory allegations," just as the non-moving party in a summary judgment proceeding may not rely on the pleadings. The plaintiff opposing a Westfall certification must submit or forecast specific and "persuasive" evidence "that, if proven, would be sufficient to take a case out of the scope of employment." *Maron*, 126 F. 3d at

322. Once the plaintiff meets its burden of persuasion, the Government "must provide evidence and analysis to support its conclusions that the torts occurred within the scope of employment." ("Step Three") *Maron*, 126 F. 3d 323.

After the Government has filed its mandatory response, the analogy to summary judgment seems to break down. In the typical summary judgment proceeding, discovery has taken place. The trial court can base its ruling on an evidentiary record. Under Fed. R. Civ. P. Rule 56(c), it is generally too late for a plaintiff to "forecast" evidence. Likewise, rarely does a trial court allow additional discovery once the issues are joined and the motion is ready for disposition.

By contrast, after the Government has responded to the plaintiff in a Westfall case, the trial court: (1) may grant discovery; (2) must identify any genuine issues of material fact; and (3) may grant an evidentiary hearing ("Step Four"). In all four post-*Lamagno* cases – *Ross*, *Borneman*, *Maron* and *Gutierrez* – the Fourth Circuit was in fact been presented with substantial evidentiary records submitted by both parties.

Finally ("Step Five"), the district court decides the scope-of-employment issue and in so doing "should weigh the evidence on each side to determine whether the certification should stand." *Gutierrez*, 111 F. 3d at 1155. The court's determination is to be based upon the "preponderance of the evidence." *Maron*, 126 F. 3d 322-323. Having decided at "Step

Four" that genuine issues of material fact exist, the trial court under *Gutierrez* and *Maron* would appear to become a finder of fact at "Step Five."

Does the Westfall Act, however, actually require substitution of a judge for a jury even at "Step Five?" Where intentional torts are alleged, substitution of the United States as defendant is fatal to the plaintiff's action. As noted in *Maron*: "The plaintiff, despite the seeming unfairness, cannot proceed against the individual defendants." *Maron*, 126 F. 3d at 322.

As *Osborn* noted, "This is no small objection...." In fact, does not such "unfairness" amount to an as-applied violation of the Seventh Amendment to the United States Constitution? A limited extension of the summary judgment analogy to Steps Four and Five of the *Gutierrez-Maron* procedure may in fact remedy such violation.

Preponderance of the Evidence

The widely assumed transformation of the United States District Court Judge into a jury takes place at "Step Five" of the *Gutierrez-Maron* procedure. The preponderance of the evidence standard does not necessarily require the trial court to finally determine all genuine issues of material fact. Of course, the trial court may do so in appropriate cases. By definition, however, a preponderance of evidence may still allow the jurors to reach differing conclusions, although a presiding judge typically denies summary judgment or a directed verdict for the defendant even in the face of

such uncertainty.

As noted above, the common law torts alleged in this action provide excellent examples. Defamation and tortious interference with contractual rights are both actions in which two questions must be decided: (1) the existence of a qualified privilege (protecting the individual defendant from liability); and (2) abuse, and loss, of the qualified privilege.[2] While a trial court – state or federal – may find the existence of qualified privilege as a matter of law, the remaining question of abuse can never be taken from the jury in South Carolina, including defamation in the workplace as here occurred.

Given South Carolina *respondeat superior* law governing the intentional torts in this case, and the inextricable role of the jury in applying that law, the *Gutierrez-Maron* preponderance-of-evidence standard allows the district court at "Step Five" to set aside a Westfall scope-of-employment certification. Where the preponderance of the only evidence would support a jury award to the plaintiff, it was an unnecessary violation of the Seventh Amendment to the United States Constitution for the plaintiff to have been denied a jury trial on the merits with Stella Donelan as the sole defendant.

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[2] – In his second memorandum to the trial court, the Petitioner specifically requested that the court separately address the two aspects of each action as it decided the scope-of-employment issue. (Docket Entry # 24, p. 21, 3:07-cv-03312-RJC.)

Returning to Osborn Part III

The Fourth Circuit's *Gutierrez-Maron* procedure actually reconciles divisions on this Court surrounding Part III of *Osborn*. Part III of *Osborn* had two sub-parts: Part III-A held that the Government could simultaneously deny the occurrence of an "incident" while certifying that the defendant employee had been acting within his or her scope-of-employment at the time; and Part III-B wrestled with the "who decides" question, in the course of which the above quoted remarks appeared. Justice Breyer dissented from both holdings in Part III.[3]

When Part III-B of the majority opinion is closely compared with the dissent, they actually can be reconciled. Having temporally confined the Westfall Act's "supplanting" effect to the period for judicial review of the certification, the *Osborn* majority moved to the substance of its holding. The starting point was the "core purpose" of the Westfall Act: resolution of immunity questions "at the earliest

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[3] – The dissent to sub-part A is not directly relevant to this petition except with regard to the "difficult, time-wasting controversies...about precisely *which facts*...are for the district judge and which are for the jury" about which the majority warned in response to Justice Breyer's dissent. *Osborn*, 549 U.S. at 247 n. 10. The *Gutierrez-Maron* procedure would not in fact require any more time because the district court would simply identify, as in a summary judgment proceeding, those genuine issues of material (if any) that State law reserves for jury disposition. If such are found in the evidence at Step Five, then the certification can be expeditiously denied.

opportunity." *Osborn*, 549 U.S. at 252-253. In a footnote, Justice Ginsberg explained why expeditious resolution of these questions and identification of the proper defendant precluded use of a jury:

> That decision cannot be left for jury resolution late in proceedings without undermining the Westfall Act's very purpose: to shift the burden of defending the suit to the United States whenever the defendant-employee was, at the relevant time, acting within the scope of his employment.

Osborn, 549 U.S. at 253 n. 18. At this point, it is useful to recall that "Step Three" of the *Gutierrez-Maron* template does "relieve covered employees from the cost and effort of defending the lawsuit" and does "place those burdens on the Government's shoulders." *Osborn*, 549 U.S. at 252. In the present case, had the trial court required the Government to produce evidence, instead of conjecture, a complete evidentiary record on Stella Donelan's scope-of-employment could have been created with no litigation burden upon Donelan herself.

In his dissent, Justice Breyer took issue with the Court's reassignment of duties from juries to judges, when most immunity defenses require fact finding generally by juries. *Osborn*, 549 U.S. 256-258. Recognizing Justice Breyer's objection, the *Osborn* majority resolved the issue with the following simple statement: "We recognize that judges have a greater fact finding role in Westfall Act cases than

they traditionally have in other immunity contexts. The Act makes that inevitable." *Osborn*, 549 U.S. at 252 n. 18.

While noting the dissent, the *Osborn* majority did not reply to the distinction drawn by Justice Breyer between legal and factual issues in an immunity determination. As the dissent observed, expeditious resolution has always been limited only to the former:

> It is highly unusual to permit special, speedy judge factfinding where immunity is at issue. Ordinarily, when a party asserts an immunity defense, *i.e.*, an "entitlement not to stand trial *under certain circumstances*," [internal citation omitted, emphasis in original], special immunity-related procedures focus not upon factfinding, but upon the proper *legal characterization* of the facts as given. Where the parties' immunity-related disagreement amounts to a dispute about the *law*, namely whether the particular set of facts alleged by the plaintiff does, or does not, fall within the immunity's legal scope, the defendant is entitled to a quick determination of the legal question by the trial judge and, if necessary, an immediate interlocutory appeal. [internal citations omitted] But where that disagreement amounts to a

> dispute about the *facts*, immunity law does *not* ordinarily entitle the defendant to special procedural treatment. Rather, the defendant must take the *facts* as the plaintiff asserts them. Like any other defendant, he can move for summary judgment. [citations omitted] But if the plaintiff provides sufficient evidence to survive summary judgment, the defendant must win the case at trial.

Osborn, 549 U.S. at 258-259.

Since the majority opinion did not discuss the distinction between legal immunity issues and factual immunity disputes, Justice Breyer's overall assessment is understandable:

> The Court's reading of the Westfall Act works a major change in this fact/law relationship. Under the Court's reading, the defendant will have the right to ask the judge to determine the facts, *i.e.*, to determine whether the events plaintiff says occurred did in fact happen. And that is so *even where the plaintiff has enough evidence to bring the case to the jury.*

Osborn, 549 U.S. at 259.

Both the majority opinion and dissent in *Osborn* agree that legal immunity issues should be expeditiously resolved. Justice Breyer believed the majority reading required a trial judge to substitute

his or her judgment on, say, credibility of witnesses for that of a jury. While the *Osborn* majority came close to saying this, such a reading is difficult to sustain given that the Court's primary focus was upon expedient and early disposition of immunity issues. There is nothing in *Osborn* to suggest that a trial judge would unduly delay resolution of immunity questions by simply finding that the preponderance of evidence on material issues of fact should allow the plaintiff to "survive the summary judgment" and proceed to jury trial upon those factual issues.

Unfortunately, the Fourth Circuit denied rehearing or *en banc* rehearing without an opinion. Either the *Guiterrez-Maron* template is an integrated and coherent approach to resolving the Seventh Amendment issue embedded in the "third rail" of the Westfall Act, or the two decisions – *Gutierrez* and *Maron* – should be reconciled by this Court by review on certiorari. So reconciled, the "summary judgment" model for judicial review of Westfall certifications merits adoption by all the federal circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

s/
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Filed: February 18, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1543
(3:07-cv-03312-RJC)

RON CHILDRESS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

and

STELLA DONELAN, Terminated,
Defendant.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Motz and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08-1543

RON CHILDRESS,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee,
and
STELLA DONELAN, Terminated,
Defendant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert J. Conrad, Jr., Chief District Judge. (3:07-cv-03312-RJC)

Submitted: December 1, 2008 Decided: December 22, 2008

Before WILKINSON and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Everett J. Mercer, THE MILES LAW FIRM, Sumter, South Carolina, for Appellant. W. Walter Wilkins, United States Attorney, Terri Hearn Bailey, Assistant United States Attorney, Columbia, South

Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM;

Ron Childress brought this action against federal employee, Stella Donelan, in a South Carolina state court alleging defamation and tortious interference with contractual relations. After the United States Attorney certified that Donelan was acting within the scope of her employment at the time of the conduct alleged in the complaint, the United States, pursuant to the Federal Employees Liability Reform and Tort compensation act of 1988, 28 U.S.C. § 2679 (2000), substituted itself as defendant in Childress's [sic] action, removed the action to federal court, and then moved pursuant to Fed. R. Civ. P. 12(b0(1) to have Childress's [sic] action dismissed for lack of subject matter jurisdiction.

Although Childress opposed the United States' substitution, the district court determined that Donelan was acting within the scope of her employment at the time of the conduct alleged in Childress's [sic] complaint, denied Childress's [sic] motion to deny the United States' substitution, and granted the United States' motion to dismiss Childress's [sic] state law tort claims.* We have

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* It was undisputed that if the United States was correctly substituted as defendant in Childress's [sic] action, the action

reviewed the record and find no reversible error.

Accordingly, we affirm for the reasons stated by the district court. See Childress v. United States, No. 3:07-cv-03312-RJC (D.S.C. filed Mar. 13, 2008; entered Mar. 14, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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was subject to Rule 12(b)(1) dismissal. See 28 U.S.C. § 2680(h)(2000); Goldstar (Panama) S.A. v. United States, 967 F. 2d 965, 967 (4th Cir. 1992).

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
3:07-CV-03312

Ron Childress,	)	
Plaintiff,	)	
v.	)	Order and Memorandum
	)	
United States of America,	)	
Defendant.	)	

I. INTRODUCTION

THIS MATTER is before the court on the plaintiff's motion to oppose the government's substitution in lieu of a federal employee sued for defamation and tortious interference with contractual rights, and the government's subsequent motion to dismiss on the basis of sovereign immunity.

Plaintiff Ron Childress was employed by the District Court for the district of South Carolina as a *pro se* law clerk from June 3, 2002, until July 28, 2006. Following his termination, the plaintiff filed an action in state court on September 25, 2007, naming Stella Donelan, the Chief Deputy Clerk of the District court of South Carolina, as defendant.

In his complaint, the plaintiff alleges that Defendant Donelan prepared a performance appraisal containing defamatory statements and that these statements tortiously interfered with his

employment contract. The plaintiff is seeking limited discovery in an attempt to show that the defamatory statements were made outside the scope of employment so that the case can go forward against Defendant Donelan personally.

II. PROCEDURAL HISTORY

The United States Attorney's office removed the case from state court to federal district court. At the time of removal, the United States Attorney certified that Defendant Donelan's conduct was within the "scope of her employment." Thereafter, the United States substituted itself for Defendant Donelan, pursuant to the Federal Employees Liability Reform and Tort compensation Act of 1988 (known as the "Westfall Act"), 28 U.S.C. § 2679(d)(2). (Doc. No. 4).

The United States moved for dismissal of the complaint on the grounds of sovereign immunity. (Doc No. 9). The plaintiff filed a timely response. (Doc. No. 24).

On February 27, 2008, the court held oral arguments on the instant motions and issued an oral order by which it denied the plaintiff's position to substitution and granted the government's motion to dismiss. This written order follows.

III. ANALYSIS

This dispute arises from Defendant Donelan's performance appraisal of the plaintiff. In her capacity as Chief Deputy Clerk, Defendant Donelan had certain supervisory duties over the plaintiff. On March 29, 2006, Defendant Donelan stated in her performance appraisal that the plaintiff used

"distasteful communication" and "disruptive behavior." (Complaint at ¶ 44). The following day, the Clerk of Court allegedly asked the plaintiff to resign. (Complaint at ¶ 47).

A. Westfall Certification

The Westfall Act affords federal employees absolute immunity for tort claims arising out of acts undertaken in the course of official duties. Osborn v. Haley, 127 S. Ct. 881, 897 (2007) (citing 28 U.S.C. § 2679(d)(1)). The Attorney General may certify that the employee was "acting within the scope of this office or employment at the time of the incident out of which the claim arose." Id. (Quoting § 2679(d)(1), (2)). Thereafter, the employee is dismissed from the suit, the United States is substituted as defendant, and the litigation is then governed by the Federal Tort Claims act ("FTCA"). 28 U.S.C. § 2671.

In Osborne [sic] v. Haley, the Supreme Court emphasized the need to investigate a complaint's charge at an early stage so that a federal employee's immunity is not prematurely stripped away:

> [J]ust as the Government's certification than [sic] an employee "was acting within the scope of his employment" is subject to threshold judicial review, so a complaint's charge of conduct outside the scope of employment, when contested, warrants immediate judicial investigation. Were it otherwise, a federal employee would be stripped of suit immunity not by what the court

> finds, but by what the complaint alleges.

Id. At 898 (internal citations omitted). The Westfall Act applies not only to negligent acts of a federal employee, but to intentional wrongs as well:

> In sum, given the purpose of the Westfall Act to shield covered employees not only from liability from suit, it is altogether appropriate to afford protection to a negligent employee as a matter of course. But it would make scant sense to read the Act as leaving an employee charged with an intentional tort to fend for himself when he denies wrongdoing and asserts he engaged only in proper behavior occurring wholly within the scope of his office or employment.

Id. (Internal quotation marks, footnotes, and citations omitted).

In Borneman v. United States, 213 F. 3d 819 (4th Cir. 2000), the Fourth Circuit enunciated the burden-shifting scheme to employ in analyzing an objection to the government's notice of certification:

> [T]he plaintiff has to burden of persuasion to refute the certification of scope of employment issued by the Attorney general and to prove by a preponderance of the evidence that the defendants were not acting within the scope of their employment. If the

> plaintiff presents persuasive evidence refuting the certification, the burden shifts to the United States to provide evidence and analysis to support its conclusion that the torts occurred within the scope of employment. To carry its burden, the plaintiff must submit specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation.

Borneman, 213 F. 3d at 827 (internal quotation marks and citations omitted).

The Borneman court also emphasized the intent of the Westfall Act to avoid unnecessary litigation, and thus placed a heavier burden on a plaintiff who wishes to engaged in discovery:

> Recognizing the desirability of quickly resolving the scope-of-employment issue because immunity under the Westfall Act, like other forms of absolute and qualified immunity, is an *immunity from suit* rather than a mere defense to liability, we emphasized that the district court should remain cognizant of the considerations weighing against protracted litigation under the Westfall Act.

Id. At 827 (internal quotations marks and citations omitted)(emphasis in original). Nevertheless, limited

discovery should sometimes be permitted to resolve factual disputes concerning the scope-of-employment issue. Id. At 827. However, "[a]t all stages of the process, it is for the district court to weigh the sufficiency of the evidence, to determine whether genuine issues of fact exist, and ultimately to resolve these factual issues." Id. At 827.

In determining whether the certification should stand, the district court "must apply the law of the state in which the alleged tort occurred to ascertain whether the federal employee was acting within the scope of his employment." Id. At 827 (citing Maron, 126 F. 3d at 323-23). Here, the instant plaintiff must present persuasive evidence that a genuine issue exists as to whether Defendant Donelan exceeded her scope-of-employment as defined by South Carolina law.

B. Opposition to Substitution

South Carolina courts have adopted the "motive" or "purpose" test for determining whether an employee's conduct is within the scope of employment. "If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." Cantrell v. Claussen's Bakery, 174 S.E. 438, 220 (S.C. 1934); see also Jones v. Elbert, 34 S.E. 2d 796, 799 (S.C. 1945) ("an act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and is in furtherance of the master's business").

In the seminal case of Crittenden v. Thompson-Walker Co., 341 S.e. 2d 385 (S.C. Ct. App. 1986), Crittenden contracted with Thompson-Walker. When Welch heard that Crittenden was not going to pay Thompson-Walker for renovations to his store. Foreman bobby Welch worked on the Crittenden project for Thompson-Walker. When Welch heard that Crittenden was not going to pay Thompson-Walker for the work he had done, he severely beat Crittenden until he agreed to pay. The South Carolina Court of appeals held Welch's actions within the scope of employment, 341 S.E. 2d at 387. Crittenden illustrates the point that a servant's intentional tort may be within the scope of his employment if the purpose benefits the employer, even if the actions exceed his authority. The court stated that "if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside of the scope of his employment." Id. at 387; see also Hamilton v. Davis, 389 S.e. 2d 297, 299 (S.C. Ct. App. 1990) ("If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended" (internal quotation marks omitted)). Accordingly, a servant's acts are outside the scope of his employment if it is *wholly disconnected* from his master's business. A mixed motive is not enough to push the servants [sic] act beyond the scope of his employment. As the south Carolina Supreme Court

has held,

> [the] fact that the predominate [sic] motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service....

Carroll v. Beard-Laney, Inc., 35 S.E. 2d 425, 428 (S.C. 1945) (internal quotation marks omitted).

The Crittenden court found that the servant's acts could be in furtherance of his master's business because: (1) the assault occurred at the job site; (2) during normal working hours; (3) incident to the servant's general duties; (4) the parties' relationship arose from work; (5) the assault took place in the presence of the master; and (6) was intended to coerce payment. 341 S.E. 2d at 387-88; cf. Hamilton, 389 S.E. 2d at 300 (employee momentarily stepped away from master's business and assault subordinate, and the court found the assault to be outside the scope of his employment because "[t]he assault was clearly of a personal nature, indulged in for his own personal amusement")

Here, the plaintiff seeks limited discovery for the purpose of showing that Defendant Donelan's actions were outside the scope of her employment. The plaintiff specifically asks for depositions of at least four persons: First, Verne K. Heckel to determine

how other staff attorneys understood Defendant Donelan's supervisory duties; Lois McLeod in her capacity as EDR Coordinator to determine what Defendant Donelan stated to her; Clerk of Court Larry Propes to determine on what authority and to what extent he permitted Defendant Donelan to supervise staff attorneys; and Defendant Donelan to determine if there were any facts supporting her alleged defamatory statements. (Doc No. 15; Motion to Deny Certification at 10-11); (TR at 11-12).

Discovery along these lines could prove Defendant Donelan exceeded the scope of her authority. It is not, however, material to scope of employment. Certain undisputed facts prove that the performance appraisal was made in furtherance of the employer's business, namely that the statements were uttered on the courthouse premises, during regular work hours, and incident to the servant's general duties as a supervisor appointed by the Clerk of Court. Furthermore, the parties had no relationship outside the boundaries of the courthouse and on all occasions the Clerk of Court ratified each action of the Chief Deputy Clerk. Finally, the evaluation was an assessment of the plaintiff's work performance.

In a non-Westfall Act claim for defamation, the instant complaint might warrant discovery. However, the Westfall Act grants sovereign immunity from suit for within scope of employment activity. See Gutierrez, 111 F. 3d at 114; see also Osborn, 127 S. Ct. At 892 (the protection afforded by the Westfall Act is a "measure designed to immunize covered

federal employees not simply from liability, from suit"). The plaintiff has failed to present persuasive evidence justifying discovery. He has not shown or forecasted that Defendant Donelan's "predominate [sic] motive" was to benefit herself, Carroll, 35 S.E. 2d at 428, or that her personal motive was "wholly disconnected" from her employer's business, Crittenden, 341 S.E. 2d at 387.

Therefore, the Court finds that Defendant Donelan's alleged defamation was made in furtherance of her master's business, and within the scope of her employment. The government is therefore permitted to be substituted as Defendant.

2. MOTION TO DISMISS

The United States, may not be sued without consent. United States v. Sherwood, 312 U.S. 584, 586 (1941). Relief against the United States requires waiver of sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976). Through the FTCA, Congress has waived sovereign immunity for certain tort claims against the United States. See 28 U.S.C. § 1346(b)(1). This waiver is limited to those claims which are not excluded.

The instant claims, namely libel, slander, and interference with contract rights, are among those torts excluded:

> The provisions of this chapter and section 1346(b) of this title shall not apply to...
> (h) Any claim arising out of assault, battery, false imprisonment, false

> arrest, malicious prosecution, abuse of process, libel, lander, misrepresentation, deceit, or interference with contract rights...

28 U.S.C. §2680(h). If the claim against the government falls within an exception to the FTCA, the cause of action must be dismissed for want of federal subject matter jurisdiction. Goldstar (Panama) S.A. v. United States, 967 F. 2d 965, 967 (4th Cir. 1992); see Talbert v. United States, 932 F. 2d 1064, 1066-67 (4th cir. 1991) (dismissing an "artful pleading" that amounted to a defamation claim because it was barred under § 2680(h) of the FTCA); Selland v. United States, 966 F. 2d 346, 347 (8th Cir. 1992) ("A claim for interference with contractual relations is not within the scope of the FTCA."); French v. U.S. ex rel. Dept. of Human Health & Human Serv., 55 F. Supp. 2d 379, 381 (W.D. N.C. 1999)(same). Because the instant claims fall within the exceptions to the FTCA, the action must be dismissed. The plaintiff rightly stipulated in oral arguments that the instant complaint should be dismissed if substitution were permitted, and as shown above, this concession is amply support by statute and case law.

VI. CONCLUSION

IT IS, THEREFORE, ORDERED that the plaintiff's Motion to Deny Certification of the government (Doc. No. 15) be DENIED, and thus the government is HEREBY substituted in lieu of Defendant Donelan. IT IS FURTHER ORDERED that the government's

Motion to Dismiss (Doc. No. 9) be GRANTED. This matter is DISMISSED WITH PREJUDICE.

Signed: March 13, 2008

s/

Robert J. Conrad, Jr.
Chief United States District Judge

Constitutional and Statutory Provisions and Regulations Involved

Constitutional Provisions

U.S. CONST. amend. VII:
"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Statutes

28 U.S.C. § 1346(b)(1):
"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil action son claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances, where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2679(d)(2):

"Up certification by the Attorney general that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney general to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal."

28 U.S.C. § 2680(h):

'The provisions of this chapter and section 1346(b) of this title shall not apply to –

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, THAT, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the

enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

Court Rules

Rule 10(a) and (c) Supreme Court Rules (SUP. CT. R.) ("Considerations Governing Review on Certiorari")

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(c) a state court or a United States court of appeals has decided an important question of federal law that

has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 12(b) Federal Rules of Civil Procedure (Fed. R. Civ. P.) ("Defenses and Objections – When and How presented – By pleading or Motion – Motion for Judgment on Pleadings")
(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-part claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the optin of the pleader be made by motion: (1) lack of jurisdiction over the subject matter...(6) failure to state a claim upon which relief can be granted....

Rule 56(c) Federal Rules of Civil Procedure (Fed. R. Civ. P.) ("Summary Judgment")
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, togehter with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there

is a genuine issue as the to the amount of damages.

South Carolina Appellate Court Rules (SCAR) Rule 407 ("Rules of Professional Conduct") Rule 5.4(c):
"A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Regulations

District Court Clerks Manual, Chapter Five, § 5.07(c), published by the Administrative Office (AO) of the United States Judicial Conference:
"Although a pro se law clerk position is allocated as part of a chief judge's staff, courts vary in assigning supervisory responsibilities, since a pro se law clerk position is supposed to provide service to the entire court. In many instances, the clerk of court supervises the administrative functions, including leave requests and salary issues, and a district judge or a magistrate judge provides substantive supervision for the legal work."

Excerpts from Petitioner's Affidavit
(filed in District Court C/A 3:07-cv-03312-RJC)
[Attachment references are retained in this Appendix, although actual documents are not reproduced herein.]

Ron Childress, plaintiff herein, being duly sworn deposes and states:

Introduction

I am a licensed attorney, admitted to the South Carolina Bar on May 14, 1979, and subsequently admitted to practice in the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit. I am a member in good standing of all these courts.

I received my undergraduate degree from Cornell University in 1967 and a commission as Second Lieutenant in the United States Air Force. From that time until July 2006, I was continuously engaged or employed in the following capacities: as a reserve officer in the United States Air Force on active duty or reserve training, including service in Vietnam and deployment to Operation DESERT STORM; earning postgraduate degrees, including the Juris Doctor (in 1978); as a lawyer in private practice and in local, state and federal government; as an employee of the United States Defense Intelligence Agency (DIA); as a college instructor in government and an adjunct professor of the University of South Carolina law school; and as a contract employee of

the United States Agency for International Development (USAID) in the Russian Federation. [See Affidavit Attachment A – Resumé of Ronald M. Childress.]

On March 31, 2006, I was forced to resign from my position as a *pro se* law clerk (now termed "staff attorney") of the United States District Court for the District of South Carolina (hereafter, the "District") – effective July 28, 2006 – because of actions taken by Stella Donelan described by the Complaint in this action and more fully set forth in this Affidavit.

Hiring as Staff Attorney

In April and May 2002, my legal writing samples were reviewed and I was interviewed by the Honorable Larry W. Propes, Clerk of Court for the District (hereafter, "Larry Propes") to fill a vacant staff attorney position. He described the position as belonging to the staff of the Chief Judge – at that time the Honorable Joseph F. Anderson, Jr. Further, Larry Propes explained that as an administrative convenience, the staff attorneys were part of the Executive Office of the Clerk of Court.

I was offered and accepted the staff attorney position. My contract of staff attorney employment with the District commenced on June 3, 2002. Within two weeks, due to my work experience and seniority in the federal judicial system, I was promoted to Grade 14, Step 3, by Larry Propes, who personally informed me of the promotion and salary increase shortly thereafter.

From all the foregoing, I concluded that my work as

a staff attorney would be supervised and evaluated by Larry Propes for and with the Magistrate Judges, the District Judges and the Chief Judge (hereafter, the "Court"). At the time, I made no further inquiry into the authority of Larry Propes to hire, supervise, discipline or fire staff attorneys. I surmised that his competence and authority arose from the fact that he was both a licensed attorney in the State of South Carolina and Clerk of Court for the District.

During orientation training, conducted by Ms. Lois McLeod, I received a brochure indicating that there were five (5) components in the "Executive Office of the Clerk of Court" – the Clerk of Court (himself and his immediate staff), the Chief Deputy for Administration, the Chief Deputy for Operations, the Divisional Managers, and the staff attorneys. [See Affidavit Attachment B – Excerpts from the District "Orientation Manual (8/21/2000)" with authenticating email from Sallie Dixon (05/05/2004).] This brochure contained no indication that staff attorneys were subordinate to either of the Chief Deputies or to the Division Managers. I understood that incumbents in these positions were co-workers with whom I was expected to cooperate in providing support to the Court – the essential mission of all personnel in the Clerk of Court's office.

During this orientation training, I was introduced to the District Personnel Manual. [See Memorandum Attachment Four – Personnel Manual (excerpts).] I understood that I would be expected to comply with all its provisions, as were all other personnel of the

District. I was not informed about the specific mechanism for enforcement of the Personnel Manual with respect to the staff attorneys. I assumed that infractions of the rules and standards would result in disciplinary proceedings on the initiative of Larry Propes. At no time during my employment with the District was I subject to any disciplinary proceeding.

Administrative Arrangements

During my first year as a staff attorney, I learned informally that Stella Donelan was authorized to approve leave requests of staff attorneys. At that time, I understood that District policy required at least one staff attorney to be on duty to answer general questions from the public. Subsequently, this practice was abandoned. Nevertheless it was still considered desirable to have at least one staff attorney on duty to answer questions from docketing personnel. For this reason, it seemed to me expedient that Stella Donelan would oversee staff attorney time and attendance (T&A), especially their leave schedules. I also learned that Stella Donelan was authorized to monitor timely completion of the staff attorney screening function because staff attorney screening affected timeliness of the case docketing process as a whole.

In the absence of any written guidance – and relying upon the above-mentioned Orientation Manual – I believed that Stella Donelan had no direct authority as a co-worker to initiate a disciplinary proceeding. I assumed, instead, that she would report failures to screen assigned cases timely or

violations of Personnel Manual rules to Larry Propes for disciplinary action. At no time during my employment with the District, was any disciplinary proceeding initiated either by Stella Donelan or by Larry Propes (as indicated above).

These administrative arrangements seemed reasonable to me. They were comparable to arrangements which I had previously encountered in other government agencies, especially the Defense Intelligence Agency (DIA). These arrangements in no way suggested that Stella Donelan was authorized to supervise staff attorneys in the performance of their substantive duties.

During my first year as a staff attorney, I maintained a cordial working relationship with Stella Donelan as a co-worker. Conversations rarely went beyond casual office "small talk." Discussions of official business were confined to scheduling matters or other administrative topics. At no time did Stella Donelan review or preview my substantive work product for the Court. Stella Donelan, in fact, did not herself assign cases. Instead, cases were assigned to staff attorneys by a random rotation, requiring Donelan's intervention only to remove an attorney from the "draw" due to leave, illness or other cause.

Unfortunately, during my first year as a staff attorney, I frequently heard Stella Donelan make disparaging remarks about her former husband (the late William Donelan, Jr.) from whom she had been divorced. One memorable statement was her lament that she had "married a lawyer -- a mistake I'll never

make again." From these remarks, I sensed that Stella Donelan was not fond of male lawyers. At that time, there were five staff attorneys, three women and two men. My predecessor had been female. I understood that the other male staff attorney, Verne K. Heckel, III, had worked at the District for more than ten or fifteen years, perhaps before Stella Donelan became Chief Deputy for Operations. In view of the foregoing – and thirty-five (35) years of experience in bureaucratic settings – I resolved to avoid any confrontation or provocation of Stella Donelan. In fact I did manage to maintain a normal and civil relationship with Stella Donelan, as a co-worker.

May 2003 "Evaluation"

In April 2003, I received an electronic notice to complete an "Employee Worksheet" to be submitted under the District "Employee Excellence Program." The form resembled comparable documents I had encountered in other government employment. Typically, such forms invite an employee to identify his or her accomplishments and problems arising during the evaluation period. Also the employee would be expected to set forth goals during the next reporting period.

I was surprised to discover that Stella Donelan was listed as my "supervisor." I completed the form, complying as best I could with the Personnel Manual. I hoped that perhaps Stella Donelan's "evaluation" was merely a first phase in the ultimate evaluation by Larry Propes and Chief Judge Anderson.

As I struggled with the form, I realized that Stella Donelan – a non-lawyer – could hardly be expected to comprehend or meaningfully evaluate research "goals" that I might set for myself. Nor could she appreciate my growing (but unspoken) dissatisfaction with the "boilerplate" approach taken by my fellow staff attorney, Verne K. Heckel. He displayed a cavalier disdain for the uniform system of citation found in The Bluebook. His practices and drafting of court documents had established a very low standard that – in my opinion and experience – reflected badly upon the Court (our "clients"). I, therefore, quietly pursued an independent course, striving to follow the "bluebook rules" and avoiding the "boilerplate" syndrome.

On May 21, 2003, I was summoned to Stella Donelan's office to receive my "Evaluation." [See Affidavit Attachment C – "Employee Evaluation" (May 21, 2003).] May 2003 was my first awareness of Stella Donelan's comprehensive claim to "supervise" the staff attorneys. For that reason, the following paragraphs explain in detail my reactions to this report. In May 2004, April 2005 and March 2006 identical report forms were used by Stella Donelan. The detailed discussion that follows will not be repeated later in this Affidavit. Stella Donelan was no more competent to evaluate my substantive work in March 2006 than she was in May 2003.

The form included blocks for sixteen "Performance Characteristics" to be evaluated by a supervisor.

These factors were: a. Attendance; b. Initiative; c. Judgment; d. Compliance with policies and procedures; e. Adaptability; f. Organization; g. Knowledge of Work; h. Quality of Work; I. Productivity; j. Verbal Communications; k. Written Communications; l. Work Relationships; m. Relations with Management; n. Responsibility; o. Time Management; and p. Teamwork.

Indisputably, Stella Donelan was qualified to observe, monitor and evaluate my Attendance [a.] and Compliance with policies and procedures [d.]. Insofar as Stella Donelan monitored monthly screening statistics, she could reasonably draw conclusions about my Initiative [b.], Organization [f.], Productivity [I.] and Time Management [o.]. Arguably, Stella Donelan was also competent to observe and report on my Adaptability [e.], Verbal Communications [j.], Work Relationships [l.] (assuming she was privy to my daily consultations with docketing clerks and my colleague, Suann White), Relations with Management [m.] (assuming she consulted with the Chief Deputy for Administration and the Division Managers)], Responsibility [n.] and Teamwork [p.].

In her narrative, Stella Donelan wrote:

> Ron has great rapport with management in the Clerk's office and is a great fit for the position. Everyone feels Ron is smart, friendly and helpful. He is a team player and all the Staffers are glad he is a member of this team.

In her conclusion, Stella Donelan wrote:

> Ron did an excellent job of assisting with the initial training of our newest staffer, Brian Threlkeld. I personally have enjoyed working with Ron this past year. He is respectful to me. Through observation, I have always noted Ron's respect and manners in his dealings with other personnel. He is a true gentleman. Ron is loyal to this office. I am proud to say he is a great asset to our team.

While flattered by her descriptions of my "gentlemanly" demeanor, I was troubled that Stella Donelan assigned particular importance to her notion that I was "respectful" toward her. She apparently mistook courtesy for respect. In fact, I did not respect Stella Donelan. For more than a year, I had observed with dismay the low morale of her actual subordinates and her manner of treating them. In addition, as noted, I had listened to her frequent deprecating remarks about her former husband. I considered these comments inappropriate in an agency of the United States government, much less a district court. Likewise, I was offended by her daily use of "Dear," "Darling" and "Hon" to address subordinates and co-workers. Nevertheless, I strove to maintain a cordial and business-like relationship with Stella Donelan as a co-worker. Nothing in my demeanor changed between May 2003 and March 2006 when, as described hereafter, Stella Donelan

suddenly discovered that I had become "rude," "disrespectful," "disruptive," and "subordinate [sic]" with a penchant for "distasteful communications."

The most distressing parts of the May 2003 report were Stella Donelan's entries for: Judgment [c.], Knowledge of Work [g.], Quality of Work [h.], and Written Communications [k.]. I was surprised to see that Stella Donelan had made entries in these boxes. She had never read any of my substantive work product for the Court nor would she have any competence to "evaluate" the work had she read it. Yet, Stella Donelan awarded a score of [Meets+] for my professional judgment, knowledge and quality of work.

During the oral interview, Stella Donelan presented her explanation. She had spoken by telephone with the United States Magistrate Judges and had taken notes during these conversations. Her report, therefore, was a summary of her notes. She solemnly declared that her report should provide "guidance" to me in future performance of my substantive staff attorney work.

As part of her narrative, Stella Donelan commented upon my transition from work as a chambers law clerk to that of a staff attorney. She seemed to believe that I was still in need of training and assistance to fully qualify for preliminary screening of *pro se* complaints as filed:

> Although Ron's experience with Judge Kosko was invaluable for certain duties assigned him in his new position, he

> still had a whole new process to learn such as screening all pro se cases (including employment discrimination cases and civil rights actions) and prisoner cases (such as civil rights actions, habeas corpus actions (including death penalty cases) and mandamus actions) to determine whether a case is in proper form, is subject to summary dismissal or should be served, etc.

Apparently, Stella Donelan did not understand that during eighteen months as a chambers law clerk, I had written over one hundred sixty (160) Reports & Recommendations analyzing the merits of employment discrimination cases, civil rights actions (prisoner and non-prisoner), habeas corpus petitions and mandamus actions, over three dozen social security cases and one voluminous death penalty *habeas corpus* petition. See David Clayton Hill v. Maynard, 9:02-cv-01319-GRA (D.S.C. 2002). As my fellow staff attorney, Trudy Muench, remarked: "You should be coaching me." I was nevertheless grateful for her kind forbearance during this mutually awkward "training" phase.

* * *

As "feedback" and "guidance," Stella Donelan's directives were of no value to me in my substantive work. My attempts to elicit meaningful oral explanations during the interview were unavailing. Stella Donelan was unable to explain any of her

entries in a manner that would be useful to a minimally competent attorney.

Ethical Issue

The May 2003 "evaluation" report was the first indication to me that Stella Donelan claimed to supervise all aspects of my work as a staff attorney. The report was also the first indication that she claimed an authority to recommend promotions and salary increases based upon her "supervision" of staff attorney substantive legal work. At the conclusion of the report, she recommended me for a "Step Increase" in salary with an emphatic, "YES!"

Upon reflection, I came to realize that my situation placed me at risk of violating Rule 5.4(c) of the Rules of Professional Conduct, promulgated by the South Carolina Supreme Court. The Rule declares that "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." By purporting to "supervise" and "evaluate" my substantive legal work, and to recommend me for promotion and salary increase, Stella Donelan placed herself in the position of the third person described in Rule 5.4(c) who controlled my compensation while I provided legal services to my real "client" – the Court.

In a private conference with Larry Propes, shortly after the evaluation, I outlined my ethical discomfort with the intrusion of a non-lawyer into the confidential relationship between staff attorneys and

the Court. On this occasion and in all later conversations, Larry Propes refused to discuss Rule 5.4(c), stating only that he was satisfied with the arrangement.

* * *

Analyzing my situation I reasoned that the District (the Chief Judge as administrator, through the Clerk of Court) as an organization was my employer but my "client" was the Court (the judicial officers, including the Chief Judge). On the one hand, the District could provide for my supervision as it provided for any other employee – "fungible bureaucrats," so to speak. On the other hand, administrative arrangements could not release me from ethical principles, such as Rule 5.4(c).

In August 2003, in the course of my soul-searching, I discovered the District Court Clerks Manual published by the AO, implementing policies of the United States Judicial Conference. Chapter Five, § 5.07(c) of the Manual provided:

> Although a pro se law clerk position is allocated as part of a chief judge's staff, courts vary in assigning supervisory responsibilities, since a pro se law clerk position is supposed to provide service to the entire court. In many instances, the clerk of court supervises the administrative functions, including leave requests and salary issues, and a district judge or a magistrate judge provides substantive supervision for the

legal work.

[See Memorandum Attachment Two – District Court Clerks Manual, (excerpt).]

In my reading of this language, the AO contemplated a division of oversight, with the "substantive supervision for the legal work" resting in the sole purview of judicial officers while such tasks as monitoring T&A could be delegated to the Clerk's office for administrative convenience. Thus, the AO had provided a mechanism whereby the staff attorney could be at one and the same time a "fungible bureaucrat" subordinate to the District as the hiring agency and also an attorney serving the Court as a "client" under all the applicable ethical rules.

Under these AO rules, therefore, the District was powerless to bestow the kind of supervision over staff attorneys to which Stella Donelan lay claim. Put simply, her fantasy of sweeping supervisory authority was well beyond her scope of employment as chief docketing clerk. By August 2003, however, Larry Propes had made it clear to me that he would not discuss Rule 5.4(c). I assumed that he understood the mandate of the District Court Clerks' Manual. It would only irritate him further if I drew attention to it. With my younger son incurring out-of-state tuition costs at Virginia Tech., I needed to keep my job if I could do so ethically.

* * *

Attorneys or Overpaid Docketing Clerks?

Over the ensuing months, several strange and

comical episodes occurred which I interpreted as efforts by Stella Donelan to demonstrate authority and control over the District staff attorneys, to include their substantive legal analyses. In late July 2003, the newly hired staff attorney, Brian Threlkeld, discovered that Rule 81 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) had been amended, effective December 2002, thereby rendering incorrect certain language in our standard *habeas corpus* orders. Himself a Yale law school graduate, Brian Threlkeld shared my reservations about the "boilerplate" approach, even with regard to standard orders. Personally, I was embarrassed that this discovery had been made by our newest staff attorney well over a year after the rule amendment was proposed.

Brian Threlkeld and I initiated a process of email discussion among the staff attorneys to develop new language for these orders and propose it to the Court. At one point, staff attorney Marcia Mason upbraided Brian Threlkeld for his suggestion that discussion of this legal matter among the staff attorneys really did not require involvement by Stella Donelan. [See Affidavit Attachments E &F – Marcia Mason emails (July 29, 2003).] Ultimately, new language was proposed and communicated, through Stella Donelan to Larry Propes and, in turn, to the Magistrate Judges with our memorandum attached. The Court approved the new language.

On August 6, 2003, I received an email from Stella Donelan that contained the following instruction:

"Ron – If you get a call on this from a Mag or Dist. Judge, you can refer the call to me and tell them I asked that it be done." [See Affidavit Attachment G – Stella Donelan email (August 6, 2003).] I was both perplexed and amused by Stella Donelan's confidence that she could coherently discuss this legal matter with the Court. Fortunately, no member of the Court actually called me. I could, therefore, safely ignore the email.

In mid-August, Brian Threlkeld received a prisoner petition for a writ of *coram nobis*. Few practicing attorneys encounter this writ in their entire careers. Fortunately, I had participated as contributor and managing editor of South Carolina Appellate Practice published by the CLE Division in 1985. The chapter that I wrote, together with the Honorable Jasper Cureton, Judge of the South Carolina Court of Appeals, dealt with common law writs, including *coram nobis*.

Preliminary research revealed that *coram nobis* – albeit supplanted by Rule 60(b) Fed. R. Civ. P. (discussed in "Advisory Committee Notes") – was still available to prisoners under 28 U.S.C. § 1651 seeking amendment of their judgments and convictions. I discovered that prisoners being detained by the Immigration and Naturalization Service (INS), and facing deportation because of their convictions, were using this writ. In the case received by Brian Threlkeld, the petitioner was being held at the Tensas Parish jail in Louisiana in precisely these circumstances. Brian Threlkeld, the docketing clerks

and I myself were all surprised to learn about this unusual proceeding.

A practical question then arose: how should the case be "coded" on the standard district court civil cover sheet (Form JS 44)? Code number 530 applied to *habeas corpus* petitions brought under 28 U.S.C. §§ 2241and 2254. The cover sheet also provided a code number 540 for mandamus and "other" petitions. Brief additional research revealed that writs under 28 U.S.C. § 1651 (the so-called "All Writs Statute") would properly be assigned this code number.

The assignment of code numbers was clearly Stella Donelan's responsibility. I left a message on her telephone notifying her that her decision and approval was needed with regard to the assignment of a code number. Shortly thereafter she appeared in my office. As I began to explain *coram nobis*, she grabbed the Federal Rules of Civil Procedure from my desk and began vigorously thumbing through it. Brian Threlkeld and I watched. It appeared that she was searching for *coram nobis*. We could have spared her this futile search, but we sensed that she might take offense at any such comment from two male lawyers. Instead, I continued explaining the nature of the proceeding and my recommendation that a code number 540 be assigned under the "All Writs Statue."

Stella Donelan exclaimed, "Those girls should have known that." I pointed out that nine of ten lawyers would not recognize *coram nobis* and that I

recognized the writ merely because of my chance involvement with the appellate handbook.

* * *

I had concluded by November 2003 that Stella Donelan considered the work of staff attorneys to be a mere extension of the docketing process. She manifested no understanding that the work of staff attorneys was an extension of judicial chambers in their disposition of substantive legal issues. To Stella Donelan, staff attorneys were merely overpaid docketing clerks as demonstrated by her favorite characterization of them as "Staffers." Her staff attorney "evaluations" revealed her profound ignorance of law and the legal profession. In light of Rule 5.4(c) and my conviction that the Court was my true "client," I adopted two resolutions to govern my future conduct as a staff attorney employed by the District:

> First, I would be required to challenge any attempt by Stella Donelan to directly interfere with my independent judgment as a staff attorney, even if it cost me my job.
>
> Second, I determined that I could not accept any future offer of promotion or salary increase based upon Stella Donelan's recommendation.

I realized that Larry Propes would not support my ethical position, having already refused to discuss Rule 5.4(c). Therefore, in any confrontation, my termination would be a foregone conclusion. With regard to promotion and salary increase, I might

arguably have accepted further promotions and salary increases based on Stella Donelan's third party status under Rule 5.4(c) so long as I retained my independent judgment. Donelan's email on August 6th had, however, signaled that she might attempt to interfere directly with my professional judgment. I was concerned that my everyday cooperation with Stella Donelan might be construed as a financially motivated acquiescence. Even though I had objected to her "evaluation" of my substantive work, it appeared that I had no choice but to sit through the "evaluation" interviews. This peacekeeping measure could also be deemed a surrender of my professional independence. I decided, therefore, that the best course of action would be to decline any promotions or salary increases at all if they depended upon her recommendation.

In November 2003, I considered seeking an ethics advisory opinion from the South Carolina Bar. Because I understood that such opinions could only be sought prospectively for contemplated conduct, however, I believed that it was too late to seek such an advisory opinion. I had already worked for a year under the existing regime (albeit unwittingly). The promotion and salary increase in May 2003 had been automatically processed, and it was too late for me to rescind it.

In October 2006, however, after termination of my employment with the District, and upon advice of an attorney, I did seek and obtain Ethics Advisory

Opinion 06-12. [See Memorandum Attachment Three – Ethics Advisory Opinion.] The opinion requires that an attorney finding himself or herself in a situation of ambiguity regarding the client – especially in government service – should seek clarification from the hiring agency as to the identity of the actual client. Throughout my employment with the District -- from May 2003 until March 2006 – I sought without success to receive such clarification from Larry Propes, even in the absence of this ethics advisory opinion.

* * *

Direct Interference under Rule 5.4(c)

On April 21, 2004, I was summoned to Stella Donelan's office, where I found her together with one of the docketing clerks. Stella Donelan was unhappy about an order signed and filed by the Honorable Margaret B. Seymour, the United States District Judge to whom the Curlee Sherman cases had been assigned. I had played no role in drafting Judge Seymour's order.

Plaintiff Sherman's filings, from November 2003 through February 2004, can be aptly termed an avalanche – one hundred (100) actions in ninety-four (94) days. Somehow he had obtained the proper forms used in the District. Because Sherman applied in each case to proceed *in forma pauperis*, his pleadings required immediate docketing and screening under PB 98-5 as described above. Ultimately, Curlee Sherman filed one hundred twenty one (121) cases in the United States District Court for the District of

South Carolina. I volunteered to screen, decipher and analyze all of these filings.

To the amusement of my co-workers, I was the only member of the staff who could read and interpret Curlee Sherman's handwritten, single paragraph "complaints." Of the initial seventy (70) actions, all but thirteen (13) were subject to summary dismissal under 28 U.S.C. § 1915. A single "omnibus" Report and Recommendation was prepared for Magistrate Judge McCrorey and adopted by District Judge Seymour, whose order on February 4, 2004, authorized review of future actions by the Magistrate Judge and entry of an order under Graham v. Riddle, 554 F. 2d 133 (4th Cir. 1977). [See Affidavit Attachment K – Order dated February 4, 2004 and Judgment filed February 6, 2004.]

At a time before my employment as a staff attorney, a procedure was adopted in the District resting upon Graham, *supra*. Under this procedure, a district judge authorized the magistrate judge to enter an order enjoining further *in forma pauperis* filings by a civil plaintiff. The district judge directive was called a "Riddle" order. By late 2003, I had personally begun to wonder if 28 USC § 636 actually contemplated such a delegation, even though the plaintiff was allowed ten days to appeal the "Riddle" order to the district judge. Despite my reservations, I evaluated the initial Curlee Sherman cases and proposed their disposition by means of a "Riddle" order.

On April 21, 2004, Stella Donelan demanded that

Judge Seymour's "Riddle" order be revised. I made several attempts to elicit a justification from Stella Donelan. She was unable to articulate a reason for amending the order, vehemently insisting that "the Fourth Circuit will send them back." I explained that the Fourth Circuit would indeed return any premature appeal by Curlee Sherman, but that there existed no legal basis to amend Judge Seymour's order.

Stella Donelan persisted in her demand. I offered to consult with Judge Seymour's chambers regarding amendment of the order. Stella Donelan demanded that I follow her instructions without consulting chambers. I declined to followed this inexplicable dictate. For the first time, in my employment at the District, I was confronted with a direct attempt by Stella Donelan to override my professional judgment and to require that I breach my ethical duty to my client (the Court). Under Rule 5.4(c) I had no choice but to resist her interference.

Polluting the Attorney-Client Relationship

After this confrontation, Stella Donelan directed Verne K. Heckel, III, to amend Judge Seymour's order. In an apparent effort to please Stella Donelan, attorney Heckel created a "strawman" issue under Rule 58 Fed. R. Civ. P. the so-called "separate document" rule. The amended order did not specifically invoke the Rule itself. Instead, the amended order cited the result in Timmons v. Short, 63 Fed. Appx. 717 (4th Cir. 2003) for the proposition that in "closing" a file, the Clerk of Court will prepare

a judgment "as required by controlling circuit case law." [See Affidavit Attachment L – Amended Order.] In fact, the original order by Judge Seymour had been accompanied by a separate judgment. [See Attachment K above.]

In truth, attorney Heckel mischaracterized the holding in Timmons. In a footnote, his amended order cited Timmons for a rule that "it is necessary for the Office of the Clerk of Court to prepare a judgment when it closes a civil case." Actually, this unpublished decision merely found that, in the circumstances of that case, Mr. Timmons' appeal was timely because the District Court had not followed Fed R. Civ. P. 58.

Oddly enough, the amended order did not refer to the lead Fourth Circuit published opinion on Rule 58, which at that time was Hughes v. Halifax Co. Sch. Bd., 823 F.2d 832 (4th Cir. 1987). Hughes articulated the Fourth Circuit view of Rule 58 as a "strict standard" to be "mechanically applied." 823 F. 2d at 834. Importantly, however, Hughes prefaced its discussion with the following language: "The purpose of this rule is to clarify when the time for taking an appeal begins to run, since the parties have only thirty days from the entry of judgment in which to file a notice of appeal with the district court." Id. An extended discussion of Rule 58 jurisprudence is not appropriate here, but the clear intent of Hughes was that Rule 58 would be "mechanically applied" to protect the rights of appellants, especially *pro se* litigants. District Judges remained free, however, to

craft their own opinions and orders as they saw fit.

Worse than the foregoing misrepresentation of law, however, was the fact that attorney Heckel's amended order characterized Timmons as "controlling circuit case law." This statement plainly contradicted Rule 36(c) of the Fourth Circuit Rules of Appellate Procedure which indicated that unpublished dispositions were not precedent. This rule was the general standard in the United States Circuit Courts of Appeal. It was a standard of which no attorney could be unaware. It was my conclusion and opinion that attorney Heckel had deliberately risked embarrassment to our joint client (Judge Seymour) in order to satisfy a stranger to our confidential relationship (Stella Donelan). I wondered at the time how attorney Heckel or Stella Donelan would have explained themselves in the event that the Fourth Circuit had noticed these oddities in the amended order.

The most serious fallout from this incident occurred approximately four weeks later during the staff attorney meeting on May 17, 2004. On that occasion I challenged attorney Heckel's amendment to Judge Seymour's order, providing copies of Rule 58 Fed. R. Civ. P. and Fourth Circuit cases applying it. He defended his text by stating that the District Judges in a meeting had formally adopted Timmons v. Short as a rule in the District. I asked to know when that meeting occurred and why the staff attorneys had not been notified, if it was a rule that might affect their work. Heckel did not respond, but Marcia Mason

sprang to his defense demanding to know if I believed that I was entitled to minutes of the judges' meetings. Stella Donelan remained silent during this exchange.

Early the next morning, May 18, 2004, I sent an email to Larry Propes for confirmation that a meeting of the District Judges had adopted Timmons v. Short as a rule in the District. His response was: "I have had no discussions with or directions from our judges, individually or collectively, about this issue. If I did, I do not recall it." [See Affidavit Attachment M – Email exchange (18 May 2004).]

Compounding the mystery, during my "evaluation" interview that afternoon, Stella Donelan stated that the adoption of Timmons v. Short actually was an "informal agreement" reached among Division Managers. I was dumbfounded by this explanation. To my knowledge, the Division Managers had no more authority to apply law than did Stella Donelan.

At this point I had heard two diametrically opposite justifications for attorney Heckel's invocation of Timmons v. Short: (1) it was adopted at a district judges meeting (of which Larry Propes had no recollection); or (2) it was adopted by the Division Managers (an action that would have been a nullity). During a break in the July 2004 staff attorney meeting, I casually asked a chambers career clerk who had joined the meeting if she had heard that Timmons v. Short had been adopted at a meeting of judges. Unwittingly, her negative answer convinced me that Stella Donelan's intrusion upon the

relationship between staff attorneys and the Court had been truly corrosive. It was my opinion that certain staff attorneys were so determined to please Stella Donelan that they would make false statements in front of their own peers.

Retaliation via the May 2004 Evaluation

* * *

On May 18, 2004, I was called to Stella Donelan's office for my evaluation interview and to receive the written report. She devoted the better part of a page to retaliation for the incident on April 21, 2004. With sufficient time, energy and determination, it may be possible to make sense out of Stella Donelan's narrative. Rather than undertake this daunting task, it is enough to note that Donelan's account on May 18th differed significantly from the actual encounter.

* * *

In her "evaluation" report, Stella Donelan described me as "intensely preoccupied in his displeasure of [sic] my supervision" of staff attorneys. She dismissed my objections to her directive as mere "displeasure with having a non-attorney" supervising him. At one point, Stella Donelan wrote that I needed to "get over" my "displeasure." These statements further revealed to me Stella Donelan's profound ignorance of and disdain for attorney professional responsibility.

On May 24, 2004, I responded to Stella Donelan's report with a Memorandum addressed both to her and to Larry Propes. [Affidavit Attachment Q –

Memorandum (May 24, 2004).] The first portion of the document dealt with the evaluation forms (described below). In the second part of the memorandum, I restated my ethical position under Rule 5.4(c) and again explained my objections to the misstatements of law in the amended order prepared by attorney Verne K. Heckel, III.

Partial Relief

As a result of Stella Donelan's May 2004 report, I believed that my employment contract would soon be terminated, despite the fact that she was incompetent to "supervise" me. As it turned out, my employment contract was not terminated. I concluded that, for the time being, my job was safe. Even though I had been compelled under Rule 5.4(c) to resist an improper interference with my independent judgment, it appeared that I would not be punished for adherence to an ethical rule. In fact, I had some hope that Larry Propes might have tacitly recognized the important principle at stake.

On May 17, 2004 – the day before my annual evaluation – Stella Donelan announced to the staff attorney meeting that all future evaluations of substantive legal work would in fact be received in written form from the Court. She had herself designed the evaluation forms for use by the Court. (The first item on the form was "demeanor.) The forms would be "reflected" in Stella Donelan's future reports, but the staff attorneys would not be permitted to see the forms.

This announcement was further encouragement to

me. For reasons unknown, the telephone conversations with Magistrate Judges would now be replaced with written documents. Still, I believed that, so long as the forms were withheld from me, I could not allow myself to accept a future promotion or salary increase. It was difficult to convince my spouse of this view.

At no point in 2004 was a six month "interim" review conducted. Thus, the next formal "evaluation" report was presented to me on April 1, 2005. [See Affidavit Attachment R – "Employee Evaluation" (April 1, 2005).] In the course of the oral interview, I candidly told Stella Donelan that, as a non-lawyer, she was not competent to evaluate my substantive work. Moreover, she was not competent even to interpret or relay the written evaluations being collected from Magistrate Judges. Stella Donelan responded heatedly that "I most certainly am competent – I know when you come back late from lunch."

This outburst revealed two significant facts. First, Stella Donelan clearly believed that her ability to observe T&A, compliance with the dress code, and timely completion of tasks provided the requisite competence to appreciate and evaluate substantive legal analysis. Second, in the heat of the moment, Stella Donelan evidently forgot that I rarely left the building for lunch, doing so only on two or three occasions in four years. Instead, I used the lunch hour daily to attend noon mass at my parish, one block and five minutes' walk away, returning in time

to eat lunch at my desk – all within sixty minutes.

At the conclusion of the interview on April 1, 2005, I formally declined a recommended promotion and salary increase pursuant to Rule 5.4(c). Stella Donelan interpreted this action as a personal affront and a challenge to her undefined and unlimited "supervision." [See Affidavit Attachment U – "Employee Evaluation" (March 29, 2006).] Stella Donelan then complained to Larry W. Propes. In a private meeting with Larry W. Propes, I again stated my belief that Rule 5.4(c) required me to resist direct interference with my professional judgment. In light of the incident on April 21, 2004, it was imperative that I decline any promotion or salary increase based on Donelan's recommendation. During the meeting, Larry Propes insisted that a staff attorney could not voluntarily decline promotion or pay increase. When I confirmed my resolve to decline the pay raise, he sighed, "I guess we'll have to live with your ethical position."

As a result of the foregoing, I wondered if my employment contract with the District would be terminated. In fact, my employment contract was not terminated. I concluded again that my job was, for the time being, safe even though I had been compelled under Rule 5.4(c) to refuse a pay raise. I even entertained the hope that Larry Propes had begun to share my view of the ethical problem.

Complete Relief

On September 28, 2005, Stella Donelan summoned me to her office for the first six month "interim

review" in almost two years. I was surprised on this occasion to receive the actual Magistrate Judge evaluation forms which had been withheld since their introduction in 2004. These Magistrate Judge evaluations were all favorable regarding my substantive performance of staff attorney duties. [See Affidavit Attachment S – "Interim Review" (September 28, 20065) and Magistrate Judge forms.]

This unexpected development resolved all my ethical problems at a single stroke. Having positive evidence that my substantive legal work was actually evaluated by the Court, while administrative matters were monitored by Stella Donelan, I concluded that I could in the future accept promotions and salary increases. I sent a memorandum to Larry Propes expressing my thanks for this complete relief from my Rule 5.4(c) difficulty. [See Affidavit Attachment T – Memorandum "New Format for Staff Attorney Evaluations (?)" (October 5, 2005).]

In her interim review, Donelan returned to an earlier theme, this time with new emphasis. She claimed to know what I was thinking ("he detests my supervision"), to have discerned my inner feelings ("displeasure with me as his supervisor"), and to have exposed my "mission" ("to remove me as his supervisor"). Claims to have read the thoughts, feelings and motives of a co-worker (or subordinate) and attempts to "evaluate" those thoughts, feelings and motives clearly exceed the scope of any supervisor's employment.

In September 2005, however, Stella Donelan's

illusory "supervision" of staff attorneys had evaporated. She could not deny that I had complied with all attendance and dress standards of the District and timely completed all cases assigned for screening. Therefore, Stella Donelan was left with no leverage other than to imagine infractions that she could then criticize. I concluded, therefore, that Stella Donelan's intemperate remarks were simply the products of wounded pride and resentment. I also concluded that Stella Donelan's outburst was not likely to affect my continued employment with the District. It neither touched upon my substantive work performance nor did it reveal any infraction under the Personnel Manual. After all, in the Spring of 2005, Larry Propes had recognized my ethical position as something "we'll have to live with." In my memorandum to Larry Propes, however, I did request relief from Donelan's petty harassment which had nothing to do with the mission of the Clerk's Office. Larry Propes did not respond to this memorandum.

On March 29, 2006, I was summoned to the office of Stella Donelan to receive my annual "evaluation." As in September 2005, the Magistrate Judge evaluation forms were attached to Stella Donelan's report. As in September 2005, these Magistrate Judge evaluations were all favorable regarding my substantive performance of staff attorney duties. For her part, Stella Donelan acknowledged that my attendance and timely screening of assigned cases were more than satisfactory. [See Affidavit Attachment U – "Employee Evaluation" (March 29, 2006).]

In the same report, however, a page-long narrative accused me of unidentified "distasteful communications," of unspecified "disruptive behavior," and of being "rude," "disrespectful," and "subordinate [sic]." I was particularly struck on this occasion by Stella Donelan's primitive word choices. She evidently was unaware that "insubordinate" and "insuborindation" were the proper terms for problem as she perceived it. (The error was made twice.) Making a rather convoluted point about my subtle manner of showing disrespect, she at least acknowledged that I did not use "nasty words." For my part, I had never heard any employee of the District using "nasty words" in the workplace.

* * *

During the meeting on March 30, 2006, I was told either to submit a letter of resignation, effective July 28, 2006, or be terminated from my employment immediately because of Donelan's allegations. I protested that all the allegations were false and requested opportunity to dispute them. Larry Propes refused to entertain any rebuttal, stating that he chose to believe Stella Donelan. Again he demanded that I resign. Failing to do so, I would be fired immediately.

Under duress, I wrote and submitted a letter of resignation on March 31, 2006. [See Affidavit Attachment W – "Letter of Resignation" (March 31, 2006).] In the letter I carefully avoided any language suggesting that my resignation was voluntary. It merely alluded to a recent visit by Azerbaijani judges

and my interest in renewing international contacts. The letter then abruptly thanked Larry Propes for "allowing" me to telecommute until July 28, 2006. Larry Propes was evidently relieved that my letter provided him with a plausible explanation. He sent me an email congratulating me for crafting a "classie [sic] letter." [See Affidavit Attachment X – Larry Propes email (March 31, 2006).] Apparently he failed to notice that the letter nowhere indicated that I was giving up my livelihood of my own free will. I was directed to vacate the building at 901 Richland Street at the close of business on April 14, 2006, after which time I would perform my staff attorney duties by telecommuting from home until July 28, 2006.

On April 28, 2006, I filed a second EDR "Request for Counseling." [See Affidavit Attachment Y – EDR "Request for Counseling" (April 28, 2006).] Although the EDR plan provides for re-employment, I had little hope of regaining my job given Larry Propes' unconditional ultimatum – resign or be fired today. Since he refused to share even the basic facts underlying Stella Donelan's false allegations, I saw the EDR process as my only way to learn the truth. While the "counseling" phase might not be productive, I anticipated that the second phase – mediation – would elicit facts given that an outside and independent moderator would preside. [See Affidavit Attachment Z – Email and Memorandum to Lois McLeod (May 3, 2006).]

To this date, I do not know Stella Donelan's true motive for her outrageous conduct. The EDR request

on April 28, 2006, reflected my uncertainty concerning Stella Donelan's motivation. On the one hand, she could have been motivated by anger that I had challenged her "authority" to supervise the staff attorneys. On the other hand, she could have resented my periodic challenges to her improper familiarities in the workplace. In the final analysis, her motives could have been a mixture of the two or something altogether different. The EDR proceedings could illuminate the truth.

It was indisputable that Stella Donelan's control over staff attorneys had been eliminated since I raised the ethical question under Rule 5.4(c): in May 2003, she based her "evaluations" on casual telephone conversations with Magistrate Judges; by May 2004, the process had been reduced to written evaluations that were withheld from the staff attorneys; and in September 2005, the forms were passed directly to the staff attorneys. Stella Donelan was left to monitor T&A, dress code and other compliance with rules, and timely completion of case screenings.

Apparently, the District may have finally realized that Stella Donelan had no role to play in the relationship between staff attorneys and the Court. I could imagine that vanity and pride might have lead Stella Donelan to fabricate stories of rudeness, disrespect, "subordination [sic]," "distasteful communications" and "disruptive behavior." My decision to decline a promotion or salary increase – announced with the utmost civility – may have actually appeared to Stella Donelan as rude or

disrespectful given her inability to understand attorney ethics.

Realizing however that the EDR process was designed to cover classic Title VII claims (sexual harassment and discrimination), my new EDR request placed emphasis on my second theory – that Stella Donelan's campaign of retaliation resulted from my comments about her untoward behavior. In late 2003, Stella Donelan suddenly accused me of being "cold" – a statement that I deemed highly improper in a federal workplace. Because it was uttered in her office, behind closed doors, I knew that there was no way to complain and sustain the charge. I had objected to her use of improper address ("dear" for example) and had made oblique reference to this practice in my "upward appraisal" in May 2004. [See Affidavit Attachment P.] It may have been that Stella Donelan's demand for my termination was a retaliatory act, taken because I had complained of her improper conduct.

As mentioned above, the motivation for Stella Donelan's actions on March 29, 2006, could have been a mixture of resentment and retaliation – or another impulse altogether. Indeed, the precise mixture of motives does not affect the claims stated in this action which are intentional torts. Motivation and consciousness of wrongdoing go to the question of actual malice and make no qualitative difference in the intentionality of the tort, as I understand it.

On May 8, 2006, the District EDR Coordinator, Lois McLeod, invited me to appear for the mandatory

"counseling" session that constitutes the initial stage of the four part EDR plan. I was shown a copy of Stella Donelan's narrative from March 29, 2006. All of her allegations had been blackened with a pen or marker. Lois McLeod asked me if these deletions satisfied my objections to defendant's "evaluation" report. I asked if this meant that Stella Donelan had admitted that her claims were false. Lois McLeod did not respond to my question.

I remarked further that if Stella Donelan had withdrawn and recanted her false allegations, then there was no reason for my forced resignation. Lois McLeod then announced that my forced resignation had been deemed a voluntary resignation. I was completely astonished by this statement, because my EDR request specifically complained that I had been forced to resign based on Donelan's false allegations. Further, Lois McLeod stated that I would not be allowed to progress to the next phase of the mandatory EDR Plan. On the contrary she was administratively terminating the procedure. I never received any written document reflecting this arbitrary termination of the EDR process.

Further, the deponant sayeth naught.

/S/ Ronald M. Childress

RONALD M. CHILDRESS

Ethics Advisory Opinion 06-12
(Filed in the U.S. District Court)

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

South Carolina Bar Ethics Advisory Opinion 06-12
SC rules of Professional Conduct: 1.2(a), 1.8(f), 1.13(b), 5.4(c), 5.5
Date: November 17, 2006

Facts

Staff Attorney in an organization performs substantive legal analysis and drafts memoranda for reliance on and use by decision-makers within the organization. Staff Attorney receives a fixed salary from the organization's operating budget. This is the only means of compensation. Staff Attorney was supervised by Senior Attorney; however, Senior Attorney has delegated supervisory functions to Senior Manager, a non-lawyer in the organization. Senior Manager will review Staff Attorney's performance according to the standard performance review for all employees; however, this review will necessarily include an evaluation of the substantive legal work provided by the Staff Attorney. Based on

the performance review and evaluation, the Senior Manager will decided whether to recommend promotions or salary increases for Staff Attorney.

Question

Does a lawyer's employment by an organization and supervision by a non-lawyer violated the S.C. Rules of Professional Conduct?

Summary

A lawyer may be employed by an organization where his immediate supervisory is a non-lawyer and the non-lawyer reviews the lawyer's substantive legal so long as the lawyer does not allow the non-lawyer supervisor to direct or regulate the lawyer's professional judgment in a way that contravenes Rule 5.4 and the lawyers does not assist the non-lawyer in practicing law in contravention of Rule 5.5. This Committee does not have jurisdiction over what constitutes the unauthorized practice of law, but it does not that, from the facts presented, it appears that all legal services are rendered by the lawyers on staff; thus, Rule 5.5 is not implicated.

Opinion

S.C. Rules of Professional conduct Rule 5.4(c) states "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Similarly, Rule 1.8(f) further impresses upon the lawyer a duty that there be "no interference with the lawyer's independence of professional judgment or with the client-lawyer

relationship" when compensation is received from on other than the client. While Rule 1.2(a) requires the lawyer to abide by a client's decision regarding the objectives of the representation, it does not suggest that the lawyer should in any way allow the client or any third party to direct the lawyer to make certain decisions.

The inquiry presented to the Committee raises the concern that the Senior Manager may interfere in the substantive legal work prepared for the organization's decision-makers. It would not be proper for the Senior Manager to direct Staff Attorney's professional judgment in rendering opinions, and Staff Attorney would run afoul of Rules 5.4(c)and 1.8(f) if he allowed such interference to occur. Rule 1.13 relating to an Organization as a Client contemplates that lawyers may be employed by organizations and have higher authority. Rule 1.13(b) requires a lawyer who knows "an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law...that is likely to result in substantial injury to the organization," to act in the best interest of the organization and, unless it is not necessary, to "refer the matter to higher authority in the organization..." The Committee suggests that the Staff Attorney address his concerns with higher authority in the organization to ensure that they are aware of the

Staff Attorney's interpretation of who the client is and his ethical obligations to the client.

Ethics Advisory Opinion 02-04 provides some additional guidance related to the supervision of attorneys by non-lawyers. Of particular interest is the discussion on determining whether there is an attempt to direct the lawyer's professional judgment.

> In determining whether the organization is attempting to direct, regulate, or interfere with the lawyer-client relationship, a distinction should be drawn between general organizational policies that identify the types of cases for which the organization is willing to provide representation and the strategy for handling particular cases. The board may properly establish policies that define the types of cases for which the organization will provide legal services, but once a case is selected and assigned to the lawyer, the organization may not interfere with the objectives, strategy, or tactics for handling the cases. These matters are determined exclusively by the client and lawyer pursuant to the Rules of Professional Conduct.

The Committee's opinion as to the ethical propriety of the arrangement is not altered whether the organization is a private entity or a governmental entity. However, the Committee would caution

lawyers employed by governmental entities to ensure that they properly determine who their client is, since there may be multiple levels of clients ranging from the specific agency and its director or commissioners all the way up to the state or federal government as a whole.

Finally, given the current climate and recent Supreme Court cases related to the unauthorized practice of law, the Committee feels it appropriate to address this potential concern. The Supreme Court has jurisdiction over the definition of the practice of law. However, in this case, a licensed lawyer is involved, and as long as the lawyer maintains his ethical and legal obligations, the Committee believes he would not run afoul of Rule 5.5.

This opinion does not address any ethical obligations of the organization's Senior Attorney or any duties he may or may not have towards the Staff Attorney.

As long as Staff Attorney does not allow Senior Manager to interfere with Staff Attorney's professional judgment and no other impermissible activities are involved, the proposed employment arrangement would be permissible under the Rules.